(17,260.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 187.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN, PETITIONERS,

vs.

WILLIAM BURRILL, JAMES BURRILL, AND OTHERS, OWNERS OF THE BARK "KATE BURRILL."

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents and Appellees.

Apostles.

Appeal from the district court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 5, 1898. James C. Reed, clerk.

1 U. S. District Court, Southern District of New York.

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents and Appellees.

Statement.

1894.
April 17. Libel filed. No process issued.
June 13. Answer filed.
" 22. Exceptions to answer filed and argued before Brown, J.
July 14. Memo. decision rendered sustaining third exception, and reversing other exceptions until further facts are stated.
" 13. Amended answer filed.
" 17. Memo. decision rendered on exceptions to answer.
Oct. 12. Order on exceptions to answer entered.
Nov. 19. Cause tried before Hon. Addison Brown, district judge.
" 28. Opinion rendered by Brown, J., construing cesser clause.

2

Dec. 17. Opinion rendered by Brown, J., on exceptions to answer.
" 31. Opinion rendered by Brown, J., denying motion for leave to amend libel.

1895.
Jan'y 9. Orders entered denying motion for leave to amend libel and overruling exceptions.
" 16. Final decree entered.
" 24. Notice of appeal filed.

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson and John R. Blauvelt, owners of the bark Kate Burrill, of Yarmouth, Nova Scotia, against William H. Crossman and George W. Crossman, in a cause of contract, civil and maritime, alleges and articulately propounds as follows:

COPY BOUND CLOSE IN CENTER

I. That at the times hereinafter mentioned the libellants were the owners of the British bark Kate Burrill, and resided at Yarmouth, Nova Scotia.

II. That at the times hereinafter mentioned the respondents were copartners in business in the city of New York, under the firm name of W. H. Crossman & Brother.

III. That on or about the 7th day of March, 1893, the libellant, William Burrill, was the managing owner of the said bark Kate Burrill, and on that day entered into a written charter-party with the respondents under their firm name of W. H. Crossman & Brother, whereby the said bark was chartered to the said W. H. Crossman & Brother, for a voyage from Pensacola, Florida, to Rio de Janeiro, Brazil, for a full and complete cargo of pitch-pine
3 lumber, under and upon deck, and in and by said charter it was agreed in the words following: Cargo to be furnished at port of loading at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, lay days to commence from the time the vessel is ready to receive or discharge her cargo, and written notice thereof is given to the party of the second part (*i. e.*, W. H. Crossman & Brother,) or agent, and for each and every day's detention by default of the said party of the second part (*i. e.*, William H. Crossman & Brother,) or agent, fifty-nine dollars and forty-six cents, U. S. gold, or its equivalent per day, day by day, shall be paid by the said party of the second part (*i. e.*, W. H. Crossman & Brother,) or agent, to the said party of the first part, or agent. That William Burrill was the party of the first part to said charter, and W. H. Crossman & Brother were the parties of the second part to said charter.

IV. That thereafter the said vessel was loaded by respondents at Pensacola, with five hundred and thirty-four thousand one hundred and ninety-four superficial feet of pitch-pine lumber, of which sixty-seven thousand three hundred and thirty-three feet were loaded on deck, and thereafter sailed from Pensacola for Rio de Janeiro, where she arrived on or about the 30th day of August, 1893. That on the voyage by perils of the sea, which were duly excepted by said charter-party, 19,939 superficial feet of said-deck load were lost, and the said vessel at the time of her arrival at Rio de Janerio had on board 514,256 feet.

V. That on the 4th of September, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Com-
4 panhia Industrial do Brazil, the agent of the respondent-at said port of Rio, who received the said cargo, but did not discharge the same at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, but on the contrary thereof, did not complete the said discharging until November 28, 1893, being a period of fifty-three days beyond the twenty-six days, Sundays exclusive, allowed for such discharge by said charter, and that the demurrage therefor at the chartered rate of

$59.46 per day amounts to the sum of $3,151.38, payment of which has been demanded by libellants from the respondents and refused.

VI. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, libellants pray that process in due form of law may issue against the respondents, and that they may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payments to libellants of the demurrage aforesaid, with interest and costs, and that libellants may have such other judgment or relief as may be just.

WM. BURRILL.

Sworn to before me this 26th day of March, 1894.

LAWRENCE KNEELAND,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in N. Y. Co.

GEO. A. BLACK,
Proctor for Libellants, 44 Pine Street, New York City.

(Endorsed:) Libel. Filed April 7, 1894.

5 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of William H. Crossman, George W. Crossman, and Hermann Sielcken, respondents, to the libel and complaint of William Burrill and others, owners of the bark Kate Burrill, in a cause of demurrage, civil and maritime.

First. Denies any knowledge or information sufficient to form a belief as to the first article thereof.

Second. Admits the making of the charter-party as alleged in the third article thereof, substantially as is therein alleged, and annexes a copy of said charter-party to the answer herein.

Third. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the fourth and fifth articles thereof, except as hereinafter admitted.

Fourth. And further answering, respondents allege that the charter-party referred to in the libel herein contained a clause providing that the vessel have an absolute lien upon the cargo for all freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading. That said vessel was fully laden, as alleged in the fourth article of the libel herein, and that thereafter and long prior to the said fourth day of September, 1893 (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready for discharge of cargo), bills of lading for the whole of said cargo were duly signed by the master of said vessel,

and that thereupon all liability of these respondents to the
6 owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel upon the failure, alleged in the fifth article of said libel, of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until same should have been paid, in accordance with the terms of said charter-party.

Fifth. And further answering, respondents allege upon information and belief that when said vessel arrived at Rio Janeiro the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom. That they were prevented from removing the same any sooner than they did by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay and recognized the necessity therefor, and when the said cargo was delivered, accepted and received from the said consignee the sum of five hundred and fifteen pounds six shillings and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter-party, and an account was made and stated between the said agents of libellants and the said consignees respecting all claims under the charter-party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof.

7 Sixth. Denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, respondents pray that the libel herein be dismissed, with costs.

WHEELER & CORTIS.
Proctors for Respondents, 45 William St., N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, says: That he is one of the respondents herein; that he has read the foregoing answer and knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

GEO. W. CROSSMAN.

Sworn to before me this 13th day of June, 1894.

JAS. MOORE,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

This charter-party, made and concluded upon in the city of New York, the 7th day of March 1893, between Wm. Burrill, managing agent for owners of the Br. bk. Kate Burrill of Yarmouth, N. S. of the burthen of 691 tons or thereabouts, register measurements, now at Barbadoes, of the first part; and Messrs. W. H. Crossman — Brother of New York of the second part; witnesseth, that the said party of the first part, agrees on the freighting and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew and stowage of provisions, sails and cables), or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Pensacola Fla. to Rio de Janeiro, Brazil, on the terms following: The said vessel
8 shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage, the merchandise hereinafter mentioned, and no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part, or agent, and no lumber to be cut. The said party of the second part doth engage to provide and furnish to the said vessel, a full and complete cargo of Resaron pitch-pine lumber, under and upon deck; the said party of the second part agrees to pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid:—

For lumber under deck:

$13.50—thirteen and one-half dollars gold, per thousand superficial feet, inch measure, intake survey.

For lumber delivered from on deck, two-thirds of the above rate; all without primage, earned and payable on proper delivery of cargo at port of discharge, in British sterling, at the rate of $4.48 gold per pound sterling, in good and approved bills on London, at usance, or in cash at the current rate of exchange for the same, at master's option, without credit or discount.

If required by charterers lay days for loading not to commence before April 10th, 1893.

Vessel to proceed with all possible dispatch direct to port of loading, to enter upon this charter.

Vessel to haul once to loading berth as may be required by charterers, or their agents, who have the privilege of moving her afterward by paying the additional towage.

Cargo to be furnished at port of loading at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

9 Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, ($59.46) fifty-nine $\frac{46}{100}$ dollars U. S. gold, (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading, within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage around in Rio bay designated by charterers.

The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed.

The vessel to be consigned to charterers' agents at port of discharge, inwards only, paying them a consignment commission of 2½ per cent. on the amount of this charter, for doing vessel's inward business.

The dangers of the seas, fires and navigation, of every nature and kind, always mutually excepted.

To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other, in the penal sum of the estimated amount of freight.

In witness whereof, we hereunto set our hands the day and year above written.

10 A commission of five per cent. upon the gross amount of this charter and demurrage, payable by the vessel and owners, due to Paul F. Gerhard & Co. and Edward Hincken's Son upon the signing hereof, vessel lost or not lost, charter canceled or uncanceled.

(Sign.) WM. BURRILL,
" W. H. CROSSMAN & BRO.

We hereby certify that this is a correct copy of the original charter-party now in our possession.

PAUL F. GERHARD & CO.,
By F. I. ZIMMERMANN, *Attorney,*
Brokers.

(Endorsed:) Answer. Filed June 13, 1894.

U. S. Circuit Court, Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

I. Libellants except to the failure of the respondents to answer the second article of the libel.

II. Libellants except to the third article of the answer on the ground that the same does not answer separately and distinctly the several matters contained in each of the said fourth and fifth articles of the libel as required by the 23d admiralty rule of the

11 supreme court, and on the ground that the same is not full and explicit and distinct as to each of said articles separately,

and to each separate allegation thereof, as required by the 27th admiralty rule of the supreme court.

III. Libellants except to the fourth article of the answer in that it does not state who was the shipper of the cargo under the bills of lading mentioned in the said article of the libel, nor to whom the said cargo was deliverable, nor upon what terms.

IV. Libellants except to the fourth article of the said answer on the ground that the same is not distinct.

V. Libellants except to the sufficiency of the fourth article of the said answer.

VI. Libellants except to the sufficiency of the fifth article of the answer.

GEORGE A. BLACK,
Proctor for Libellants, 44 Pine Street, New York City.

(Endorsed:) Libellants' exceptions to answer. Filed June 22, 1894. Third exception sustained; other exceptions reserved until the facts as to bill of lading on the consignment are stated. July 14, '94. A. Brown.

12 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The amended answer of William H. Crossman, George W. Crossman and Hermann Sielcken, respondents, to the libel and complaint of William Burrill and others, owners of the bark Kate Burrill, in a cause of demurrage, civil and maritime,

First. Denies any knowledge or information sufficient to form a belief as to the first article thereof.

Second. Admits the allegations contained in the second article thereof.

Third. Admits the making of a charter-party, as alleged in the third article thereof, substantially as is therein alleged, and annexes a copy of the said charter-party to the answer herein.

Fourth. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the fourth and fifth articles thereof, except as hereinafter admitted.

Fifth. And further answering, respondents allege that the charter-party referred to in the libel herein contained a clause providing that the vessel have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading. That said vessel was fully laden, as alleged in the fourth article of the libel herein, and that thereafter, and long prior to the said fourth day of September, 1893, (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro, that
13 said vessel was ready for discharge of cargo) bills of lading for the whole of said cargo were duly signed by the master of said vessel, a copy of which is annexed hereto and made part hereof, and said bills of lading were duly assigned and delivered to

the Campania Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel Dias da Cruz & Filho, who thereby became the consignees of said cargo, and that thereupon all liability of these respondents to the owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel upon the failure alleged in the fifth article of said libel of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of said charter-party.

Sixth. And further answering, respondents allege upon information and belief, that when said vessel arrived at Rio Janeiro the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom. That they were prevented from removing the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay and recognized the necessity therefor,

14 and when the said cargo was delivered, accepted and received from the said consignee the sum of five hundred and fifteen pounds six shillings and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter-party, and an account was made and stated between the said agents of libellants and the said consignees respecting all claims under the charter-party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents and accepted and received by them in full satisfaction thereof.

Seventh. Denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, respondents pray that the libel herein be dismissed, with costs.

WHEELER & CORTIS,
Proctors for Respondents, 45 William St., N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, says: That he is one of the respondents herein; that he has read the foregoing answer and knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

GEO. W. CROSSMAN.

Sworn to before me this 12th day of July, 1894.

HENRY J. WING,
Notary Public, Kings Co.

[L. S.]

Certificate filed in N. Y. Co.

A copy of the charter-party referred to in the third article hereof will be found at the end of the testimony.

15

W. H. Crossman & Bro., shipping and commission merchants, New York.

Shipped, in good order and well conditioned by W. H. Crossman & Bro. on board the bark called the Kate Burrill, whereof T. Wilson is master, now lying in the port of Pensacola, and bound for Rio de Janeiro, to say:

Marks.	Pieces.	Lumber.	S. Ft.
		Eight thousand seven hundred and eighty-nine pieces p. p. Rio deals, containing five hundred and thirty-four thousand one hundred and ninety-five superficial feet.	
		Of the above lumber one thousand and two (1,002) pieces are on deck, containing sixty-seven thousand three hundred and thirty-three (67,333) superficial feet. Measurement unknown to master.	
Total, 8,789 pieces.			Total, 534,195.

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Rio de Janeiro (the dangers of the seas, fire, and collision excepted) unto order or to their assigns, they paying freight for the said lumber as per charter-party, dated 7th March, 1893, and average accustomed.

In witness whereof, the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

16

Dated in Pensacola, the 5th day of May, 1893.

T. WILSON.

(In red ink: Consignors' copy. Not negotiable.)

(Endorsed:) Amended answer. Filed July 13, 1894. I think the amendments within sufficient to answer the previous objections and exceptions; but I will hear the libellant further, if he desires, upon the next motion day in August. July 17, 1894. A. Brown.

At a stated term of the district court of the United States for the southern district of New York, held at the court-rooms thereof in the post-office building in the city of New York, on the 9th day of October, 1894.

Present: Hon. Addison Brown, district judge.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

The exceptions of libellants to the answer herein having been argued by the advocates for the respective parties, and the court having sustained the first and third exceptions and overruled the second and fourth exceptions, and reserved the fifth and sixth
17 exceptions to the sufficiency of the fourth and fifth article of the said answer for further argument, after said answer had been amended. And the respondents having filed an amended answer, wherein the articles were renumbered, and the matter numbered 5th in the original answer was numbered 6th in the amended answer, and the fifth exception to said 5th article of the original answer (numbered 6th in the amended answer) having been brought on for further argument, after hearing the advocates for the respective parties, it is

Ordered, that the said fifth exception be further reserved until the hearing and determination by the court of the truth and sufficiency of the other matters alleged in defense of the action.

ADDISON BROWN.

(Endorsed:) Order. Filed Oct. 12, 1894.

18 United States District Court, Southern District of New York.

WILLIAM BURRILL and Others
against
WILLIAM M. CROSSMAM and Another.
} Before Hon. Addison Brown, Judge.

NEW YORK, *November* 19, 1894.

Appearances.

George A. Black, Esq., for libellants.
Wheeler & Cortis (Mr. Cortis), for respondents.

The claims of the libel and answer are stated.

Mr. Cortis states that this case is brought to trial on the issue as respects the bill of lading and the cessor clause set up in the amended answer, and the issue as to the agency of the consignees for the respondents as respects these goods.

Mr. Cortis offers in evidence and reads the deposition of George W. Crossman, taken November 17, 1894.

Mr. Black renews his objection (offered at page — of Mr. Crossman's depostiion) to the contents of the bill referred to by Mr. Crossman.

Taken subject to objection.

19 U. S. District Court, Southern District of New York.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

Testimony of George W. Crossman, a witness on behalf of respondents, taken before George Moore, notary public, at 45 William street, New York, November 17, 1894.

Present—Mr. George A. Black, for libellants. Mr. Harold G. Cortis, for respondents.

The witness, having been duly sworn, testified as follows:

Direct examination by Mr. CORTIS:

Q. What is your business?
A. Merchant.
Q. What is your firm?
A. W. H. Crossman & Brother.
Q. Are you one of the respondents in this action?
A. I am.
Q. Where are you engaged in business as a merchant?
A. 77 and 79 South street, New York city.
Q. What is the document I now show you (witness shown document)?
A. A copy of the charter-party of the British bark Kate Burrill for a cargo of pitch pine from Pensacola, Florida, to Rio de Janeiro, Brazil.

Offered in evidence and marked Respondents' Exhibit 1.

20 Q. In pursuance of the terms of that charter-party, was that vessel loaded with lumber?
A. She was.
Q. Did your firm supply the lumber for the loading?
A. We bought it from the mills.
Q. Did your firm afterwards sell that lumber?

Objected to.

A. No; it was sold before we bought it.
Q. By whom was that sold?
A. By ourselves.
Q. To whom?
A. To the Companhia Industrial do Brazil.
Q. What is that document? (Paper shown witness.)

A. Consignors' copy of the bill of lading of the bark Kate Burrill.

Q. For the voyage in question?

A. Yes.

Paper offered in evidence. Marked Respondents' Exhibit 2.

Q. Do you know the signature?

A. I couldn't swear to the signature; I presume it to be that of the captain.

Q. I see this is marked "Consignors' copy;" what other copies were there?

A. There was a full set of three bills of lading and the consignors' copy and ship's copy.

Q. There were three negotiable bills of lading?

A. Yes, and one consignors' copy and one copy which went to the ship.

Q. Besides the three negotiable bills of lading?

A. Yes, making five altogether.

Q. Do you know what was done with the other three bills of lading, the negotiable ones?

A. They were forwarded according to the instructions contained in the letter of credit, against which we drew.

Q. To whom were they forwarded?

A. One to the bank in London, attached to our draft. Another was forwarded to the agents of the bank in Rio de Janeiro.

21 The third bill of lading was sent by a subsequent mail, with the duplicate documents, to the bank in London.

Q. To whom was the vessel consigned?

A. To the Campanhia Industrial do Brazil.

Q. You have stated that this lumber was sold before you bought it. Describe in your own language the transaction from the beginning, confining yourself to this particular cargo of lumber?

Objected to as immaterial.

A. The Companhia Industrial do Brazil cabled to us from Brazil, requesting us to quote——

Objected to unless cable is produced.

December 7, 1892, the company cabled to us asking a price at which we could buy a cargo of 550,000 to 600,000 feet of pitch pine, from Pensacola, to be shipped in May or June.

Q. Asking a price at which you could buy?

A. Supplied to them.

Q. At which they could buy?

A. Yes. "At which price can you supply us, cost, freight and commissions?"

Q. Have you a copy of that cable with you?

A. No; I have it at the office.

Q. Can you produce it?

A. Yes.

We replied December 9, 1892, offering them a cargo of 550,000

to 600,000 feet of lumber, from Pensacola, May–June, at twenty-nine dollars a thousand feet—cost, freight, commissions and insurance. On December 10th they cabled to us that the price was too high, that others were offering at less. On December 12th we cabled to them that with an actual order in hand we could probably fill at twenty-eight dollars, cost, insurance, freight and commissions. December 12th they cabled to us accepting. On December 13th they wrote to us confirming the order, as shown by the letter which I have.

Portion of letter referring to cargo offered in evidence and marked Respondents' Exhibit 3.

22 (Witness continues:) We placed the order for the lumber and chartered a vessel—we had the refusal of a vessel and a cargo—and when the offer was accepted and the business concluded we simply finished it by handing it over to the parties from whom we bought, or had the refusal.

Q. What was your next step after the Companhia do Brazil accepted your offer?

A. Confirmed it to the parties who had given us the refusal.

Q. Confirmed what?

A. The order. They gave us the refusal of the vessel and the cargo.

Q. From the same parties?

A. Yes.

Q. You then confirmed your charter of the vessel?

A. No; he chartered the vessel.

Q. Who?

A. The party from whom we bought the cargo. He provided the vessel, we signed the charter-party.

Q. After receiving the acceptance of your offer you chartered the vessel and bought the cargo?

A. Yes; not simultaneously.

Q. What was the next step?

A. There was nothing done after that until the vessel was loaded. When the vessel was loaded and the documents signed, we billed them to the Companhia do Brazil.

Objected to as to the contents of the bills.

Q. Have you a bill or a copy of the bill?

A. I have. (Produces paper.) That is a copy of the bill charging the cargo of the Kate Burrill to the Companhia Industrial do Brazil, in Rio de Janeiro.

Q. The bill of your firm?

A. Yes.

Bill offered in evidence. Marked Respondents' Exhibit 4.

Q. Was that bill paid?

A. Yes.

Q. When and how?

A. By our draft on the London and River Plate Bank, Limited, of London, against their letter of credit.

Q. Against whose letter of credit?

A. The London and River Plate bank.

23 Q. Against their letter of credit issued to whom?

A. W. H. Crossman & Brother, for account of Companhia Industrial do Brazil.

Objected to as statement of letters of credit, which should be produced.

Q. Have you a copy of the letter?

A. I think so, though they are generally returned after they are exhausted.

Q. Will you endeavor to find that?

A. I will. I think very likely it has gone back.

Q. When did you obtain that letter of credit?

A. I couldn't say.

Q. You say you don't recollect the exact date when you were paid for this cargo?

A. I didn't say that. I got the check from the bank (perhaps May 12th) in New York city, to whom we sold our draft on London; or we may have remitted that to our own bankers in London to the credit of our account.

Cross-examination by Mr. BLACK:

Q. When you say you had a letter of credit, do you mean to say that you had one for this particular transaction, or that it was a general letter of credit, on which you drew for any transaction you had?

A. A general letter.

Q. And these goods were therefore paid for, so far as the actual turning in of each to you and of this letter of credit, as a loan by the bank?

A. Not as a loan; a payment by the bank.

Q. Didn't the bank have the bills of lading and the invoice?

A. Yes.

Q. As their security for what?

A. For the cargo.

Q. As their security for what?

A. The cargo of lumber.

Q. What interest had they in the cargo of lumber?

A. They had the interest of receiving a commission from the parties for whose account they issued the letter of credit.

24 Q. It was issued to you?

A. By the bank for account of the Companhia Industrial do Brazil, whom they charged.

Q. You mean to say that the letter of credit ran to the account of the Companhia Industrial do Brazil?

A. Yes, for their account was opened.

Q. It was a particular letter of credit for their account?

A. No, a general letter of credit.

Q. I asked you whether it was a particular letter of credit for their account?

A. Certainly it was.

Q. How long had you had that letter?

A. I couldn't say; not longer than six months; they are issued for that length of time; perhaps only four months, perhaps only a month.

Q. You had been having numerous transactions with this Companhia do Brazil?

A. Yes; many.

Q. And you had been drawing on the letter of credit, handing over the bills of lading and the invoices to the bank as their security for the amount of their advances, hadn't you?

A. Yes.

Q. That was the nature of the transaction?

A. I presume that was the condition.

Q. That was the nature of the transaction between you and the bank?

A. Yes.

Q. This cargo was insured, was it not?

A. Yes.

Q. Who insured it?

A. W. H. Crossman & Brother.

Q. In what company?

A. I think in the United States Lloyds.

Q. Was there a loss collected on it?

A. That I couldn't tell.

Q. Don't you know that a portion of the deck cargo was lost?

A. I don't remember the details of that.

Q. You would have a record of it in your office?

A. Yes.

Q. Will you kindly look up that record?

A. I will.

Q. This bill of lading bears date May 5, 1893, and on the face of it has stamped in red ink "As per charter-party," dated 7th March, 1893. Do you know when that stamp was put on?

25 A. I do not know, but I suppose when the bills of lading were made out in our office.

Q. You prepared those bills of lading in your office and had them sent down to Pensacola, did you not?

A. Yes.

Q. It is a bill of lading on one of your printed forms, is it not?

A. Yes.

Q. Did you have any correspondence with the owner or master of this vessel concerning this cargo?

A. Not to my knowledge.

Q. Did you inform the master or owner of this vessel, otherwise than by preparing the bill of lading in which the cargo was deliverable to order, that you were not the parties interested in this cargo?

A. I don't think we did. It would be unusual if we did.

Q. You had an agent at Rio, had you not?
A. At that time?
Q. Yes.
A. No.
Q. Have you ever had?
A. My partner has been there on two or three occasions.
Q. Have you ever had an agent residing there?
A. We have a house with whom we work; that might be considered in the capacity of an agent.
Q. What was the name of the house?
A. Walter Christensen & Co.
Q. Did you give any instructions to the master of this vessel as to who he was to consign on arrival at Rio?
A. We always do, and I presume we did in this instance.
Q. Have you that letter?
A. Not with me.
Q. Have you a copy of it?
A. Yes.
Q. Please produce it.
Q. I notice that this charter-party contains this clause: "Vessel to be consigned to charterers' agents at port of discharge." She
26 was so consigned, was she not?
A. The concern was not our agent.
Q. You have heard that clause of the charter-party; she was consigned to the charterers' agents at the port of discharge, was she not?
A. They were not our agents.
Q. But this clause of the charter-party declared that she was to be consigned to your agent, did it not?
A. That may be.
Q. And you did consign her, did you not?
A. I consigned her, of course.
Q. Did you notify the captain or owner of this vessel that the person to whom you consigned her was not your agent?
A. It would not be likely.
Q. They would have a right, would they not, from the language used in this charter-party, to believe that the vessel was to be consigned to the charterers' agents?
A. I couldn't say what construction they would put on it.
Q. Wouldn't that be the commercial construction of those words?
A. I presume they might consider it so, yes.
Q. Do you know who actually was the representative who did the vessel's business on behalf of the charterers at Rio?
A. Phipps & Co.
Q. Of the charterers or the owner? The parties to whom she was consigned, 9 Companhia Industrial do Brazil.
Q. And you consigned her to that company, did you?
A. Yes.
Q. You informed us that you had bought this lumber for the purpose of loading this vessel, from some mill; what mill was that?

A. I couldn't tell you without referring; it was bought of the company here in New York, Wheelwright & Co.

Q. On being loaded of course you paid them for this lumber?

A. Yes.

Q. And it was your lumber, was it not, when you paid for it?

A. Yes.

Q. I understood you to say that you had disposed of the three regular bills of lading, exclusive of the ship's copy and the
27 consignor's copy, that you sent two to the bank in London, one by one mail, and one by another?

A. That would be the natural course.

Q. That is what you did testify to?

A. That would be the natural course of business.

Q. That is what you did testify to?

A. That is what I presume we did.

Q. You have so testified?

A. Yes.

Q. And the third of those was sent to the agent of the bank at Rio?

A. I presume that was done.

Q. Who was the agent of the bank at Rio?

A. The same concern, the London and River Plate bank at Brazil as well as London.

Q. They have the same title in both places?

A. I presume so.

Q. They didn't have an agent with a different name?

A. I don't know.

Q. You had a good many transactions with them?

A. I didn't; it was clerical work in the office.

Q. You have signed a great many letters addressed to those parties, haven't you?

A. Not a great many.

Q. Many?

A. Yes.

Q. Did you also correspond with the Companhia Industrial do Brazil?

A. Yes.

Q. With regard to the starting?

A. Yes.

Q. Of course you have copies of those letters?

A. Yes.

Q. Will you kindly produce any copies of letters addressed by you to the company relating to this shipment?

A. Yes.

GEORGE W. CROSSMAN, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. CORTIS:

Q. You testified in this case on Saturday?

A. Yes, sir.

Q. On Saturday you were asked to produce a letter of credit,
28 and you said you would endeavor to produce it; have you been able to get it?

A. No, sir; because it was returned to the bank after having expired by its limitation.

Q. Whereabouts was it returned to the bank; what bank?

A. To the London and River Plate Bank of London

Q. Whose letter of credit and in favor of whom?

A. The letter of credit was issued by the London and River Plate Bank of London, at the request of the Rio de Janeiro bank.

Mr. Black objects, and asks that the words "at whose request" be stricken out.

Q. In whose favor?

A. In favor of William H. Crossman & Brother.

Q. For whose account?

A. For account of Companhia Industrial do Brazil.

Objection overruled.

By the COURT:

Q. Was it ordered by you or not?

A. It was not.

By Mr. CORTIS:

Q. Do you know for whose account?

A. It is stated on the letter of credit, the Companhia Industrial do Brazil.

By the COURT:

Q. You say that that appeared on the face of the letter; was that sent to you?

A. Yes, sir.

Q. The letter of credit was sent to you?

A. Yes, sir.

Q. By whom?

A. By the London and River Plate Bank of London.

Q. Why have you not got it?

A. Because it expired and we always return them after they have been exhausted or expired.

Q. When did it expire?

A. It expired in January, 1894.

29 Q. You say you returned it to whom?

A. To the London and River Plate Bank of Rio de Janeiro. It must therefore have been issued by the London and River Plate Bank of Rio and not of London.

Q. Is that a branch of the London concern?

A. Yes, sir; it must be, because they are identically the same in name, and their credits are made one with the other. We draw on London and send some documents to London and others to Rio Janeiro, showing the connection between the two.

Q. Haven't you any copy of that original letter of credit?
A. No, sir; we never keep copies of the credits; we hold them until they are exhausted or expired and then return them to the bank.

(By Mr. CORTIS:)

Q. Have you a copy of the letter enclosing that letter of credit after it expired when you returned it?
A. Yes, sir.
Q. Have you it with you?
A. I have.

The letter is produced and offered in evidence.
Mr. Black objects.
It is ruled out on the objection.

By the COURT:

Q. Haven't you got the letter which executed the letter of credit to you?
A. No; I haven't that.
Q. Why not?
A. I didn't bring that; I didn't suppose it was necessary.
Q. Have you got it in the office?
A. Yes, sir; undoubtedly.
Q. Have you got any letters from this Companhia Industrial do Brazil going to show any of their acts in regard to this letter of credit?
A. A previous letter we have showing that.

By Mr. CORTIS:

Q. Was this original letter of credit sent to you by the Companhia Industrial do Brazil or by the bank?
A. I judge that it must have come from the company in Rio. It is customary to issue letters from both banks; in this instance, since it was returned to the Rio branch of the London and River Plate bank, it was sent by the Companhia Industrial do Brazil and not by the London banker, as I have stated.
Q. Have you that letter in your possession in your office?
A. We must have the letter in our office which enclosed to us the letter of credit.
Q. Will you produce it?
A. Yes, sir.

By the COURT:

Q. Have you got any letters here from the Companhia Industrial do Brazil in relation to this letter of credit?
A. No, sir.
Q. Have you at your office?
A. Yes, sir.
Q. Please produce them also?
A. Yes, sir.

Q. Was that bill sent to them (referring to the bill mentioned on page 6 of Mr. Crossman's deposition)?
A. It was.
Q. How?
A. Sent to them by mail in the regular way.
Q. Do you know the time?
A. I don't know the date of the departure of the mail, but on or about the date of the bill; the first day following, I presume.

By Mr. CORTIS:

Q. Have you got any reply from them in reference to the bill?
A. It is impossible to say whether they have answered; we have had some correspondence on the subject of the cargo, but whether they have answered I don't know. The bill was in conformity with the price we agreed to pay them by the cables which have passed between us.
Q. Is it customary to make any reply to a bill of that sort?

Objected to.

A. No, sir; if it is in order.

By the COURT:

Q. Have you ever received any objection to this bill?
A. None whatever.

The bill, Exhibit 4 of Crossman's deposition, is admitted for the present.

31 By Mr. CORTIS:

Q. You were asked on Saturday to produce certain cables?
A. I have the originals and copies and translations.
The first cable that I produce is the one inquiring about the price at which we could furnish cargo or cargoes. The original cable is in code. I have had it translated. (Reading:) "Rio Janeiro, Dec. 7, 1892. At what price per 1,000 feet can you ship a cargo to Rio cost insurance freight and commission of merchantable pitch pine specification C 500 to 550,000 feet clearance second or third month after next from Pensacola which means March April."
"At what price per 1,000 feet can you ship a cargo to Rio of merchantable pitch pine cost insurance freight and commission specification C 550 to 600,000 feet clearance from Pensacola deliverance May June."

By the COURT:

Q. Did you answer that?
A. I am coming to it (reading):
"Both with 20 per cent. 4 inches by 9 inches 30 feet upward.
Q. Have you got your telegram in reply?
A. To which we replied on Dec. 9: "We can ship cargo of mer-

chantable pitch pine 3 by 9 and 14 to 60 feet long cost insurance freight and commission at about 29 dollars 500 to 550,000 feet clearance from Pensacola second or third month after next."

"We can ship a cargo of merchantable pitch pine 3 by 9 14 to 60 feet long cost insurance freight and commission at about
32 28 dollars 500 to 550,000 feet clearance from Brunswick second or third month after next."

"We can ship a cargo of merchantable pitch pine 3 by 9 14 to 60 feet long cost insurance freight and commission at about 29 dollars 550 to 600,000 feet clearance from Pensacola."

"We can ship a cargo of merchantable pitch pine 3 by 9 14 to 60 feet long cost insurance freight and commission at about 28 dollars 550 to 600,000 feet clearance from Brunswick sail clearance May June refer to your cable of seventh."

Which means this answer refers to cable of 7th.

Q. Did you get a reply to that?

A. Yes, sir. Dec. 10. "Price quoted 4 is too high try and get a reduction others offering for less."

To which we answered on Dec. 12: "We might buy if we had an order at 28 dollars Pensacola."

They replied December 12: "Ship in accordance with our cablegram of December seventh."

Their cablegram of December 7th called for both shipments to be made from Pensacola, and we stated in our last that if we had an order in hand we could probably do that; so they said, go ahead and do that at $28; we couldn't do that.

Here is the next cablegram: "Dec. 12, sailer clearance March April Brunswick quality guaranteed. Sailer clearance May June Pensacola both 28 dollars better is impossible cable if satisfactory."

To which they replied on December 13: "Ship in accordance with your cablegrams;" that closes the transaction.

By Mr. BLACK:

Q. You had a letter after that, one of those exhibits in your deposition?

A. That is the order sheet confirming it by mail; after the transaction was concluded, as is customary, they sent us a regular order sheet in writing; it is dated December 13th, received by us on January 16th.

33 Mr. CORTIS: It is an exhibit in the deposition, marked Respondents' Exhibit 3.

The WITNESS: It is simply a confirmation of the order.

By the COURT:

Q. Have you got any letter from them saying anything about the mode of paying you?

A. None whatever, that was all settled by a previous arrangement with those gentlemen.

Q. Have you got that?

A. No, that was made years ago; we simply held the letter of credit in hand, and we were to draw against them.

Mr. Black objects and moves to strike out the last answer.

The COURT: He may state his mode of dealing with them.

Mr. Black objects that it is in writing and should be shown by the contract.

By the COURT:

Q. How long have you been dealing with them?

A. Ever since the company has been in existence; I think about four years; with their predecessors about 10 or 12 years. We deal in all kinds of merchandise, such as agricultural implements and lumber and miscellaneous goods.

Q. Were these dealings sales of goods to them?

Objected to.

A. Positive sales we never had any other relations with them than that of selling goods outright and drawing on their bankers with letters of credit for whatever shipments we might make to them by either steamers or sailing vessels.

Q. How many transactions had you with them a year on the average, speaking roughly?

34 A. We would have a transaction perhaps twice a month by steamer—that would be twenty-four, I should think, and three or four times a year by cargoes of sailing vessels; sometimes more and sometimes less. I would also like to state that we have been acting as their exclusive agents for years and years.

Q. You have said that you have been in the habit of selling them goods for four years. I want you to tell in general what has been their mode of paying you for the goods which you sold them?

A. They have kept us supplied with bankers' letters of credit which we always had on hand for their account.

Q. You understand a good deal better than a person who is not familiar with their mode of business. Will you tell us what was your habit of doing things in order to get your pay?

Objected to.

A. As soon as the shipments were completed and the bills of lading were signed, we drew against whatever letters of credit we might have in our possession, and followed the conditions of that letter of credit, whatever they might be.

By Mr. CORTIS:

Q. What were the conditions ordinarily?

Objected to. Excluded for the present.

Cross-examined by Mr. BLACK:

Mr. BLACK: I will read from the cross-examination of Mr. Crossman (reading):

"Q. Didn't the bank have the bills of lading and the invoices? A. Yes. Q. As their security for what? A. For the cargo. Q. As their security for what? A. The cargo of lumber. Q. What interest had they in the cargo of lumber? A. They had the interest of receiving a commission from the parties for whose account they issued the letter of credit." * * * "Q. This cargo was insured, was it not? A. Yes. Q. Who insured it? A. W. H.
35 Crossman & Brother. Q. In what company? A. I think in the United States Lloyds."

Q. You collected a loss on this cargo?

A. Yes, sir; a small portion of the deck-load cargo.

Q. Who was that loss paid to?

A. Paid to ourselves.

Q. What was the amount?

A. $347.94.

(Reading:) * * * "This bill of lading bears date May 5, 1893, and on the face of it has stamped in red ink 'as per charter-party,' dated 7th March, 1893. Do you know when the stamp was put on? A. I do not know, but I suppose when the bills of lading were made out in our office. Q. You prepared those bills of lading in your office and had them sent down to Brazil, did you not? A. Yes. Q. It is a bill of lading on one of your printed forms, is it not? A. Yes. Q. Did you have any correspondence with the owner or master of this vessel concerning this cargo? A. Not to my knowledge. Q. Did you inform the master or owner of this vessel, otherwise than by preparing the bill of lading in which the cargo was deliverable to order, that you were not the parties interested in this cargo? A. I don't think we did. It would be unusual if we did." * * * "Q. Did you give any instructions to the master of this vessel as to who he was to consign on arrival at Rio? A. We always do, and I presume we did in this instance."

Q. Have you that letter?

A. Yes, sir; a copy of it.

Q. Please produce it.

A. (Witness produces letter.)

Q. Is that a copy of it?

A. Yes, sir.

Mr. Black offers the copy letter in evidence and reads it as follows:

"NEW YORK, *March* 30, 1893.

"Messrs. Compahnia Industrial do Brazil, Rio de Janeiro:

"We herewith take pleasure in introducing to you the
36 captain of the bark Kate Burrill, sailing from Pensacola, Florida, consigned to your good selves. Hoping this vessel will make a safe passage and discharge her cargo in good condition and to your entire satisfaction, we remain,

"Yours very truly,

"(Signed) W. H. CROSSMAN."

(Reading:) * * * "Q. I notice that the charter-party contains this clause, 'Vessel to be consigned to charterers' agents at port of discharge.' * * * Q. And you did consign her, did you not? A. I consigned her, of course. Q. Did you notify the captain or owner of this vessel that the person to whom you consigned her was not your agent? A It would not be likely. Q. They would have a right, would they not, from the language used in this charter-party, to believe that the vessel was to be consigned to the charterers' agents? A. I couldn't say what construction they would put on it." * * * "Q. Do you know who actually was the representative who did the vessel's business on behalf of the charterers at Rio? A. Phipps & Co. Q. Of the charterers or the owner? A. The parties to whom she was consigned—Companhia Industrial do Brazil. Q. And you consigned her to that company, did you? A. Yes. Q. You informed us you had bought this lumber for the purpose of loading this vessel from some mill. What mill was that? A. I couldn't tell you without referring; it was bought of the company here in New York, Wheelwright & Co. Q. On being loaded, of course you paid them for this lumber? A. Yes. Q. And it was your lumber, was it not, when you paid for it? A. Yes."

Q. Who was it negotiated the terms of this charter?

A. I suppose that was negotiated by our buyer and the agents of the ship.

Q. Somebody in your employ?

A. Yes, sir.

Q. Did you ever inform the captain or owner of this vessel of the fact that this was not your lumber which he was carrying under this charter-party?

A. We did not in that, nor did we in any other; we never did.

37 Redirect by Mr. CORTIS:

Q. You have testified that you collected a certain sum of money for the loss of a deck-load; did you ever account to anybody for that money?

A. Yes, sir.

Q. To whom did you account for it?

Objected to as immaterial. Objection overruled.

A. To the Companhia Industrial do Brazil; it was insured for their account.

Mr. Black moves to strike out the words "insured for their account," as not responsive to any question.

Objection overruled.

By the COURT:

Q. Was there any other correspondence between you as to the manner in which you should be paid for this sale of lumber?

A. No, sir. May I explain? As I stated in my testimony, we have always been supplied with bankers' letters of credit from these

gentlemen, and when our letter of credit was expired they would send us another or instruct the London bank to send us another, and it was understood that we would draw against whatever letter of credit or credits we might have in hand, and there was no stipulation as to how we should reimburse ourselves as to any particular order that was sent to us; it was simply following along in the natural order of business. They never did give us any instructions unless under some special condition, so I doubt very much whether there is any letter down there.

Q. Between what amounts did these letters of credit run?

A. From £10,000 to £25,000 sterling.

Q. What was your custom, if any, upon making drafts under those letters of credit on account of any goods shipped to them, in regard to giving them any notice of your drafts?

Mr. Black objects as immaterial.

Objection overruled.

38 A. We forwarded them the documents, and we also stated to them that against such and such a shipment we have drawn on such and such a letter of credit for so much sterling, which at the rate of 4.82 or 4.85, whichever it might be, would equal the amount of the invoice.

Q. Did you give them any such notice in this case?

A. Yes, sir, we must have done so.

Q. Where is it?

A. In our correspondence.

Q. Have you got a copy of it?

A. I have got a copy of the correspondence to the bank at the office, but not here.

Q. That is important. Do you know whether you received any answer to that letter which you now speak of?

A. I don't think so; there would be no answer made unless there was some irregularity, some cause to complain or something of that kind.

Q. Can you testify as to the fact whether you did or did not give them such a notice of this draft?

The same objection.

A. We must have done so; yes, sir, we surely did.

Q. Can you state whether you ever received any objection from them?

The same objection.

A. Yes, sir; had there been any objection it would have been referred to me; our finance matters are always referred to me.

Q. You must produce the letter that enclosed the letter of credit against which you drew, and which ought to show on whose account that letter of credit was, and also produce the letter which you say you wrote to them giving them notice that you had drawn on that letter of credit for this bill?

A. Yes, sir.

(Testimony closed.)

39 RESPONDENTS' EXHIBIT 1. November 17, 1894.

Is the charter-party annexed to the answer.

RESPONDENTS' EXHIBIT 2. Nov. 17, 1894.

Is the bill of lading annexed to the amended answer.

RESPONDENTS' EXHIBIT 3. Nov. 17, 1894.

RIO DE JANEIRO, 13 *de Dezembro de* 1892.

Per "Strabo"
Smrs. W. H. Crossman & Bro.
New York.

Orders — By sailer
Perdidos — Por Navro.

feet of pitch pine of
No. 1884 500,000 a 550,000 pes de Pintro de resina de
First quality
O B Primeira qualidade
3 / 258

Assortment of of 30 feet and up
Sortimento: 20% de 4" x 9" de 30 pes pasa cima;
& the balance to be being half of to feet
e v resto de 3" x 9" sendo metade de 14 a 28 pes.
& the other half of 30 feet and up.
e outra metade de 30 pes para cima.
To be despatched from Brunswick in March or April 1893.
Despacho de Brunswick em Marco ou Abril de 1893.

40

feet of pitch pine of
No. 1885 550,000 a 600,000 pes de pintro de resina de
First quality
O B Primeira qualidade
3 / 260

Assortment 20% of 4" x 9" of 30 feet and up
Sortimento: 20% de 4" x 9" de 30 pes para cima;
& the balance to be 3" x 9", being half of 14 to 28 feet
e v resto de 3" x 9" sendo metade de 14 a 28 pes
& the other half of 30 feet and up.
e outra metade de 30 pes para cima.
To be despatched from Pensacola in May or June 1893
Despacho de Pensacola em Maio on Juntro de 1893
In confirmation of our cablegram No. 135 of today.
Confirmacao de nosso telegramma No. 135, de hoje.

Pela COMPANHIA INDUSTRIAL DO BRAZIL,
EDWIN E. HINE, *Theraurens.*

41 RESPONDENTS' EXHIBIT 4. Nov. 17, 1894.

Order No. 1885. No. 190.

77 & 79 BROAD STREET,
NEW YORK, *May 5th*, 1893.

(Copy)—Invoice of lumber shipped by W. H. Crossman & Bro., per bar Kate Burrill, consigned to order, for account and risk of MeCia. Industrial do Brazil.

Rio de Janeiro.

Mark: ——.

Under deck:

7,787 pcs. yellow-pine lumber, 466,862 ft., at 28.00 C. I. F. & Com	$13,072 13	
Less freight at 13.50 per M	6,302 63	
		$6,769 50
On deck:		
10,020 pcs. yellow-pine lumber, 67,333 ft., at 23.50 C. I. F. Horn	1,582 32	
Less freight at 9.00 per M	605 99	
		976 33
		$7,745 83
Insured for under deck		$8,125 00
" " on deck		1,175 00

American gold, value this day.
E. & O. E.

42 United States District Court, Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

In admiralty. Demurrage. Cesser clause.

George A. Black, for libellants.
Wheeler & Cortis, for respondents.

BROWN, *J.*:

The above libel was filed to recover fifty-three days' demurrage, for the detention of the bark Kate Burrill at Rio de Janeiro in the unloading of a cargo of lumber at the stipulated charter rate of $59.46 per day. The respondents in their charter of the vessel from the libellants had stipulated that the vessel should "be discharged at the rate of 20,000 feet per day, lay days to commence from the time the vessel was ready to discharge cargo, and written

notice thereof given to the libellants or their agents; and that for each day of detention by default of said parties of the second part or their agent $59.46 should be paid; vessel to discharge at safe anchorage ground in Rio bay, designated by charterers or their agents." The charter contained the further stipulations, "Vessel to have an absolute lien on the cargo for all freight, dead freight and demurrage; charterers' responsibility to cease when the vessel is loaded and bills of lading are signed; bills of lading to be signed as presented without prejudice to this charter; the vessel to be consigned to charterers' agents at port of discharge."

43 The answer alleged that the lumber was shipped to the libellants' vendees in Rio under a bill of lading to order, which was endorsed to the vendees of the timber, and by the latter again endorsed to subvendees before the arrival of the bark; that the delay was caused wholly by the acts of public enemies at Rio, to wit, certain vessels of war which were then in the harbor and making war upon the government of Brazil; and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed; and further, that the captain of the vessel and the agent of the libellants acquiesced in the delay and recognized the necessity therefor; and when said cargo was delivered, accepted and received by the vendees, the sum of £515 6s. 5d. was accepted in full satisfaction and payment of all claims under the charter-party. The respondents further claim that they were relieved from all liability by the cesser clause of the charter above quoted.

For the convenience of the parties, and to save the expense and delay of a commission to Brazil to take proof of the facts pertaining to the other defenses, the cause was brought to trial as to the effect of the cesser clause above quoted.

The provisions of the charter-party are in form contradictory. One clause declares that for every detention by default in receiving or discharging the cargo by said parties of the second part, or agent (the respondents), the demurrage, as above specified, shall be paid by them. The other clause declares that their responsibility shall cease when the vessel is loaded and bills of lading are signed. A previous clause also provided that the cargo should be discharged at the port of destination at the rate of 20,000 — per day.

The general intent of these provisions taken together manifestly is that the ship shall be paid, not only freight, but demurrage, for detention beyond the stipulated time in discharging. The

44 various clauses of the charter in this regard should be interpreted consistently, so far as possible, with this general purpose, as well as with its further presumed purpose to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship, by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and demurrage, has it in her power to enforce payment of her claims by means of that lien without a resort to the charterers. In the cases of Clink *v.* Radford (1891), 1 Q. B., 625, and Hansen *v.* Harrold (1894), 1 Q. B., 612, the relation of these

clauses to each other have been recently carefully considered in the English court of appeal, and the rule laid down is that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated; and that where "the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply, in so far as the lien, which by the charter-party the charterers are enabled to create, is not equivalent to the liability of the charterers;" and that "where the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien, which can be exercised by the ship-owner, is commensurate with such liability."

This is substantially the construction that was given by this court to the cesser clause in the case of Hatton *v.* The Belaunzaran, 26 Fed., 780, where notwithstanding the cesser clause the charterer was held liable to pay demurrage, because under the right to effect a subcharter he had required the ship to take a cargo of salt not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

In the present case the respondents, as charterers, had the
45 right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter; it means only that the charterers' obligations to the ship and owners should not be affected by the terms of the bill of lading thus signed on the charterers' requirement (Gledstanes *v.* Allen, 12 C. B., 202).

The bill of lading for the lumber in question provided for "paying freight for said lumber as per charter-party dated 7th March, 1893, and average accustomed." A bill of lading in this form imposed upon the endorsee of the bill of lading who received the goods under it none of the stipulations of the charter except such as pertained to the payment of freight (Chappell *v.* Comfort, 10 Com. B. (N. S.), 801; Smith *v.* Sieveking, 4th El. & B., 945; Fry *v.* Chartered Bank, L. R., 1 C. B., 689; Dayton *v.* Parke, 142 N. Y., 391, 400). It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per day, or in default thereof pay a specified price per day for any further detention of the vessel. Under this bill of lading the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages, for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention from whatever cause, and agrees upon a specified rate of damages.

Had the bill of lading provided for the payment of freight and "all other conditions as per charter-party," the latter provision would have been construed *ejusdem generis* as imposing upon the consignee the payment of something more than freight, and would

have included the obligations referred to in the charter-party respecting the rate of delivery and the payment of the demurrage specified, though not necessarily including independent pro-
46 visions of the charter-party relating to different subjects (Russel *v.* Nieman, 17 Com. B. (N. S.), 162; Serraino *v.* Campbell, 25 Q. B. D., 501; S. C. (1891), 1 Q. B., 283; Wagner *v.* Smith, 15 C. B., 285; Portus *v.* Whortly, L. R., 3 Q. B. Div., 534).

What the respondents, therefore, in this case virtually required the master to do was to give a bill of lading for this lumber; that required the master to deliver it to the endorsee of the bill of lading, without the payment of any charter demurrage at all, such as the respondents had agreed should be paid; but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently, or by design, is immaterial as respects the ship. For the ship could only claim of the vendee according to the bill of lading (the H. G. Johnson, 48 Fed. Rep., 696). The bill of lading required the ship to deliver the cargo contrary to that provision of the charter which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause and the lien clauses were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage, by presenting, and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses.

Whether there was any "safe anchorage ground within the bay at which the vessel could discharge;" whether the vessel was able to perform her part of the contract "by delivering at the port of discharge according to the custom of said port," and whether
47 there was "any default on the part of the respondents or their agents in receiving the goods," must, therefore, be considered upon further evidence to be taken, as well as the alleged settlement with the master in satisfaction of all such claims.

New York, November 28, 1894.

BURRILL
vs.
CROSSMAN.

BROWN, *J.*:

The exceptions to the other parts of the answer must be overruled. The facts stated in the answer, the truth of which must be accepted on this argument, amount, in my judgment, to a complete defense. As respects the lay days, the charter provided "Lay days to commence from the time the vessel is ready to receive or discharge cargo and written notice thereof is given to the party of the second part, or agents; and for each and every day's detention or default

of the said party of the second part, or agents, $59.46 shall be paid. * * * Vessel to discharge at safe anchorage ground in Rio bay, designated by charterers."

The charter does not fix a definite time from which the lay days are to be computed in any other way than from the time that the ship is "ready to discharge and gives notice thereof." The libel states that the ship arrived at Rio on the 30th of August, and that on the 4th of September, 1893, "notice that she was ready to discharge was duly given," &c.

The answer states that "by reason of the acts of public enemies, to wit, certain vessels of war which were then in the harbor of Rio de Janeiro, and were engaged in firing upon the forts and making war against Brazil, they were prevented from removing the cargo any sooner than they did," and that "the firing between said vessels of war and the forts made it impossible to remove the cargo from the said vessel any sooner than it was removed," and that after the discharge the agent of the libellants and the consignees
48 made a settlement in full satisfaction of all claims under the charter-party, and the balance found due was paid.

The substance of this defense is that by reason of the public enemy and actual warfare in Rio bay it was "impossible to remove the cargo from the vessel" sooner than was done. It was the vessel's duty "to remove the cargo from the vessel," for that is the act of discharge; and it was the consignee's duty to receive it as removed. In this case at the rate of 20,000 feet per day. The ship's duty to remove and discharge the duty and the consignee's duty to receive are concurrent duties; and where performance by either is prevented by major force neither is in "default," unless that risk has been assumed by the contract, which is not the case here (Ford *vs.* Cotesworth, L. R., 4 Q. B., 127; 6 do., 544; Kay *vs.* Field, 10 Q. B. Div., 241; Dahl *vs.* Nelson, 6 App. Cases, 38; Carsenago *v.* Wheeler, 16 Federal, 248; the Spartan, 25 Fed., 44, 51).

This case is quite different from those in which a charterer has contracted to discharge the cargo within a certain time after "arrival," and thereby takes all risks of delay. Under this contract (1) the charterer was to designate a safe anchorage ground for discharging in Rio bay and (2) the vessel was to get in readiness to discharge and then to give notice thereof, before the lay days would begin. The vessel was not bound to undertake a discharge at an unsafe place; nor was the charterer required to receive the cargo at an unsafe place, nor outside of Rio bay. No time being stipulated within which the charterer should designate a safe place of discharge, he was bound to do this within a reasonable time, according to all the circumstances (Henly *vs.* Brooklyn Ice Co., 14 Blatch., 522; Fish *vs.* 150 Tons of Brown Stone, 20 Fed., 201, and cases there cited; Parquette *vs.* Cargo of Lumber, 23 Fed., 301; the Spartan, *supra*). The answer in effect alleges that this was done as soon as possible.

The libel does not allege that the vessel was actually ready
49 to discharge at any time before the discharge actually began. It only asserts that notice of readiness was given. That is a very different thing. Such notices are often given by shipmasters

in the attempt to set demurrage running before the ship is ready or able to perform her obligation to discharge (Carsenago *vs.* Wheeler, *supra;* Tiedman *vs.* Plock, 17 Fed., 266; affd., 21 do., 349).

The plea of accord and satisfaction is also a sufficient defense. Questions of safety of the vessel in discharging, of actual ability and readiness to deliver dependent upon the circumstances existing at a distant port, are peculiarly within the province of the master, or the ship's local agent, to consider and to determine in their relations to such a question as that of demurrage; and a settlement by either with the charterer or consignee is presumptively valid and conclusive, and should only be set aside upon such special proofs as in equity would invalidate settlements with the principal, nothing of which here appears (Alexander *vs.* Dowie, 1 Hulst. & N., 152; the Gulnare, 24 Fed., 487).

The exceptions are therefore overruled.

Dated New York, December 17, 1894.

BURRILL } *v.* CROSSMAN.

This case has been twice heard upon exceptions by the libellant to the answer, upon the understanding—at least on the part of the court—that the hearing was to be treated as the trial of the cause, upon the admission of libellants' counsel in open court that the facts were correctly stated in the answer; this course being adopted in order to avoid the expense and delay of a commission to Brazil, in case the facts alleged in the answer should be held to constitute a legal defense. Two opinions have been delivered by the court after these hearings. The latter being adverse to
50 the libellants, their proctor now moves for leave to withdraw the exceptions, and to amend their libel "so as to confess and avoid, explain and add to, the new matter set forth in the answer." This, if allowed, would involve quite a substantial departure from the understanding had, at least by the court, in the previous proceedings, which would have been quite different had it been considered that any such application as the present was to be subsequently made. The only misunderstanding now alleged by the libellants' proctor I understand to be as to the scope of the words in the answer, "impossible to remove the cargo;" but on the argument and before submission, the court stated that "removal" included delivery by the ship as well as receipt by the consignee.

The last hearing was upon the admission of counsel in open court that the facts were stated with substantial correctness in the answer, viz., that naval warfare in the harbor of Rio, "made it impossible to remove the cargo sooner," which the court held to be a major force, under which the consignee or charterer was not in "default;" and further, that the facts respecting such warfare, and the extent of its interference with the vessel's discharge in a distant port, were specially within the scope of the master's authority to appreciate and determine, as the representative of the ship-owners; and that any

settlement made by him in satisfaction of freight and demurrage, or of "all claims," as alleged in the answer, was within his lawful power, and was binding upon the libellants.

The application to confess and avoid does not set up any facts inconsistent with what was admitted on the previous hearings, and stated in the answer. The affidavit does show that a safe place was at first designated, and the discharge begun; but that the discharge, after it was commenced, was suspended at different times for upward of fifty-three days, the delay claimed in the libel; and the affidavit does not affirm or suggest that this suspension
51 was not caused solely by the naval hostilities stated in the answer, or that suspension was not the necessary result of those hostilities. The affidavit, therefore, inferentially confirms the answer to this extent and the admission made on the argument. The forced interruption of the ship's power to deliver, where no time has been agreed on, stops demurrage, as much as her inability to begin would stop it. It is a case of a concurrent duty in the ship to deliver, because the charterer here did not contract to assume the risk of her inability to deliver 20,000 feet per day; and whenever she was unable to do that, no matter what the cause, she could not claim demurrage (Ford *v.* Cotesworth, L. R., 4 Q. B., 127; Riley *v.* Cargo of Iron Pipes, 40 F. R., 605; the J. E. Owens, 54 do., 185).

The application further states "an intent to allege" that the sum paid was only the amount of the freight due, and to deny the authority of the master, or of Phipps Bros. & Co., agents, to receive that sum in full satisfaction of all claims and demands, and also to deny that they had any authority to make or state an account respecting all claims under the charter-party. The denial of the master's authority is a mere question of law. The affidavit does not state that the amount paid at Rio was not there paid and received or intended as a settlement of all claims for freight or demurrage.

The libellants' counsel claims an absolute right under the 51st rule of the supreme court in admiralty to amend the libel in order to confess, avoid and explain, as above stated. Though such an amendment would undoubtedly be allowed if applied for at a proper time, no such right exists after the parties have proceeded to a hearing upon the pleadings; nor if it did, could it be allowed upon the mere affidavit of the proctor, as in this case, as to what the libellants "intend to allege," where no fact is set forth in the application incompatible with the allegations of the answer,
52 or avoiding their legal effect. As respects mere denials of such allegations, no such amendment is necessary.

The application is, therefore, denied.

Dated New York, December 31, 1894.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-house, in the city of New York, on the 9th day of January, 1895.

Present: Hon. Addison Brown, judge.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

The exceptions filed by the libellants herein to the sixth article of the amended answer having been brought on for argument, and after hearing the advocates for the respective parties herein, it is

Ordered, adjudged and decreed, that said exception be and the same hereby is overruled.

A. BROWN.

(Endorsed:) Order overruling exceptions. Filed Jan'y 9, 1895.

53 United States District Court, Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George A. Black, being duly sworn, says: That he is proctor for the libellant- herein. That libellants excepted to the fifth article of the original answer (numbered VI in the amended answer), which set up as defenses a state of war at Rio, which prevented the consignee of the cargo from receiving the same, and which also set up an account stated between the master of the bark and the alleged agent of libellants, Phipps Brothers & Company, and also set up a settlement between them of all claims under the charter-party, which the said article claimed constituted a bar to this action. That the libellants desire to withdraw their exceptions and amend their libel herein under the 51st admiralty rule of the United States, so as to confess and avoid, explain and add to the new matter set forth in the answer, and for that purpose ask the court to fix a time by special order within which the libellants may so amend their said libel and within which the defendants shall answer such amendments. That by the said amendments the libellants propose to allege that at the time of giving notice of the readiness of the vessel to discharge on the 4th of September, 1893, the said vessel was actually ready to commence her discharge, and that she did, as
54 a matter of fact, on the 5th of September, haul to the anchorage designated by the charterers' agent at Rio, and did on Wednesday, the 6th of September, 1893, discharge a portion of her said cargo, which was received by the said charterer or consignee of cargo, "and on Saturday, the 9th of September, discharged a still further portion of her said cargo, and on Monday, the 11th of September, continued her discharge, all the while lying at anchorage." That the said consignee about that time requested the said vessel to haul to a dock, and that on Monday, September 11th, efforts were made to haul her into the dock, which were not successful, on account of her drawing too much water. That on Thursday, the 14th of September, a further portion of her cargo was discharged,

and the efforts were renewed to heave her into her berth. That on Wednesday, the 13th of September, the discharge was further continued, and efforts again made to heave her into her berth. That on Thursday, the 14th of September, a further portion of her cargo was discharged, and the vessel was then hove into her berth at the saw-mills in the evening and swung alongside the wharf. That on Friday, the 15th of September, and Saturday, the 16th of September, and Monday, the 18th of September, and Tuesday, the 19th of September, and Wednesday, the 20th of September, and Thursday, the 21st day of September, and Friday, the 22d day of September, and Saturday, the 23d day of September, and Monday, the 25th day of September, and Tuesday, the 26th day of September, and Wednesday, the 27th day of September, and Thursday, the 28th day of September, and Friday, the 29th day of September, and Saturday, the 30th day of September, the said discharge was continued, but not at the rate agreed upon in the said charter-party. That the said discharging was commenced again on Monday, the 16th day of October, continued on Tuesday, the 17th of October, suspended until Monday, the 23d day of October, renewed again on Friday, the 27th day of October, suspended until the 6th day
55 of November, when it was continued; suspended again until Friday, the 17th of November, when it was renewed; suspended until Friday, the 24th of November, when it was renewed, and again suspended until Tuesday, the 28th of November, when it was again renewed and completed; and that deponent has obtained the information as to the above-stated facts from the log book of said bark now in his possession. That the said libellants also intend to allege by way of avoidance in said amended libel that neither the master nor Phipps Brothers & Co. had any authority to, or did, in fact, receive from the consignees the sum of £515 6s. 5d. in full satisfaction and payment of all claims and demands under the charter-party, nor did they have any authority to make any account or state any account on behalf of libellants with the said consignees respecting all claims under the charter-party aforesaid, nor was the balance due to the libellants paid by said consignees as alleged in said fifth article of the answer, nor any more than the freight.

GEO. A. BLACK.

Sworn to before me this 18th day of December, 1894.

LAWRENCE KNEELAND,

[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

Please take notice that upon the foregoing affidavit and the proceeding herein, the libellants will move this court at a stated term thereof, to be held at the post-office building, in the city of New York, on the 26th day of December, 1894, at eleven o'clock in the forenoon, for an order that the libellants may withdraw their exceptions to the fifth article of the answer (sixth of the amended answer) and amend their libel so as to confess and avoid, explain and

add to the new matter set forth in the fifth article of the an-
56 swer and sixth of the amended answer, and that the said court fix the time within which such amendments may be made, and the time in which the respondents shall answer such amendments, or for such other and further relief as may be just.

Dated New York city, December 18, 1894.

Yours, &c., GEO. A. BLACK,
Proctor for Libellants, 44 Pine Street, New York City.

To Messrs. Wheeler & Cortis, proctors for respondents.

(Endorsed:) Affidavit and notice of motion. Filed Jan'y 9, 1895.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-house, in the city of New York, on the 9th day of January, 1895.

Present: Hon. Addison Brown, judge.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

Upon reading and filing the affidavit and notice of motion by libellants' proctor, for leave to amend the libel herein, and after hearing proctors for the respective parties, it is

Ordered, adjudged and decreed, that the said motion be and the same hereby is in all respects denied.

A. BROWN.

(Endorsed:) Order denying motion for leave to amend libel. Filed Jan'y 9, 1895.

57 At a stated term of the district court of the United States for the southern district of New York, held at the post-office building, in the city of New York, on the 15th day of January, 1895.

Present: Hon. Addison Brown, judge.

WILLIAM BURRILL and Others
against
WILLIAM H. CROSSMAN and Another.

Exceptions having been filed by the libellants herein to the sufficiency of the answer set up by the respondents, and said exceptions having been brought on for argument, and after hearing the advocates for the respective parties, been overruled, and a motion having been made by libellants for leave to amend the libel herein, which said motion was after argument by the respective counsel denied, now, on motion of Wheeler & Cortis, proctors for respondents herein, it is

Ordered, adjudged and decreed, that the libel herein be and the same hereby is dismissed, with costs, without prejudice to any other

libel based on different facts. And said costs having been taxed at the sum of forty-seven and $\frac{40}{100}$ dollars, on like motion it is further

Ordered, adjudged and decreed, that the respondents herein recover of the libellants said sum of forty-seven $\frac{40}{100}$ dollars, and that the stipulators for respondents' costs cause the obligations of their stipulation to be fulfilled within the time limited by the rules and practice of this court.

ADDISON BROWN.

(Endorsed:) Final decree. Filed Jan'y 16, 1895.

58 District Court of the United States for the Southern District of New York.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

Please take notice that the libellants appeal to the United States circuit court of appeals for the second circuit from the final decree entered herein on the 16th day of January, 1895.

Dated January 22, 1895.

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. Wheeler & Cortis, proctors for respondents, Sam'l H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed Jan'y 24, 1895.

59 District Court of the United States for the Southern District of New York.

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
GEORGE W. CROSSMAN ET AL., Respondents, Appellees.

Assignments of Error.

I. The district court erred in overruling libellants' exception to the sixth article of the amended answer.

II. The district court erred in denying libellants' motion to withdraw their exception to the sixth article of the amended answer and to amend their libel.

III. The district court erred in dismissing the libel herein.

GEO. A. BLACK,
Proctor for Libellants, Appellants.

(Endorsed:) Assignments of error. Filed Jan'y 24, 1895.

60 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

WILLIAM BURRILL ET AL., Libellants and Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents and Appellees.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 4th day of February, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

60½ United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL., Libellants, Appellants,
vs.
GEORGE W. CROSSMAN and HERMAN SIELCKEN, Respondents, Appellees.

New Proofs on Appeal.

Appeal from the district court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Sep. 23, 1898. James C. Reed, clerk.

61 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

PROVINCE OF NOVA SCOTIA, *Yarmouth,* } *ss:*

William Burrill, being duly sworn, says: That he is the managing owner of the bark Kate Burrill, and made the charter on which this action is founded, and attended to her finances. That deponent received after the said vessel had completed her discharge of cargo at Rio, a protest from the master, of which a copy is annexed, and also from Phipps Brothers & Co. two accounts, of which copies are hereto annexed, and also the remittances mentioned in said accounts, and has received no other accounts and no other remittances. That neither the master of the said bark, nor the said Phipps

Brothers & Co. had any authority to or did in fact make any
62 settlement or adjustment or compromise of the claim for demurrage herein nor was any account held in respect thereto, as deponent believes from the documents aforesaid, and from not having received any information of any such occurrence from either the said master or the said Phipps Brothers & Co., and that the said account purporting to be the account of the Companhia Industrial do Brazil, deponent verily believes was the account made up by that company, as consignees of the cargo and was for freight alone, and that there is no mention in said account of any item of demurrage.

Deponent further says that the said accounts and the protest were delivered by him to George A. Black, proctor for libellants, when the matter was put in his hands to commence the suit for damages herein.

WILLIAM BURRILL.

Sworn to before me this 23d day of February, 1895.

E. H. ARMSTRONG,
[SEAL.] *U. S. Vice and Dep'ty Consul.*

63 Dr. Messrs. Wm. Burrill & Co. in account with Phipps Brothers & Company. Cr.

1893.						
Oct. 9th.	To telegrams to Yarmouth...	21.120	Nov. 10th.	By cash received from Cia Industrial do Brazil ac.		
Nov. 16th.	To our remittance £875 0 0 at 10½d.....	20.000.000		Freight per Kate Burrill, £875 0 0 at 10½d..	20.000.000	
Dec. 13th.	To disbursement of Kate Burrill as per list..	7.137.520	Dec. 7th.	By cash received from Cia Industrial do Brazil. Balance of freight as per their statement.....	6.770.230	
" "	To commission collecting freight £26.770, $230 at 1%	267.700				
" 18th.	To telegram to Yarmouth	17.600	" 18th.	By balance	673.710	
		R.27.443.940			R.27.443.940	
Dec. 18th.	To balance £29 2 6 at 10½d....	673.710				

E. & O. E.
Rio de Janeiro, 18th December, 1893.

PHIPPS BROTHERS & CO.

64 RIO DE JANEIRO, *November* 22, 1893.

The B. B. Kate Burrill, 691 tons, Captain Wilson, in account with Companhia Industrial do Brazil, consignee.

To entry at custom-house and captain of the port ...	R. 40.000
" conferring manifest and list of stores.....	40.000
" translation of manifest and copy	22.500
" stamps	50.000
" lighterage ac....	4081.4000
" towage ac...	112.500
" commission on inward freight, 2½% on £13 0 6 5 = £34 15 2 at 10⅜	804.050
	R. 5150.450

CR.

By amount of freight as per charter-party, 466,862 ft. at 13.50 and 47,392 ft. at 13.50 minus ⅛=$6,729.17 at 4.84 = ... 1,390 6 5	
Less received 875 0 0	
£515 6 5 at 10.3⅛	R. 11920.680
Balance due vessel	R. 6770.230

E. & O. E.

Pola COMPANHIA INDUSTRIAL DO BRAZIL,
EDWIN E. FAIR, *Thesoureiso.*

65 Know all men by these presents that on this twelfth day of December, 1893, before me, W. G. Abbott, Esq., H. B. M. consul general for this city and State of Rio de Janeiro, personally came and appeared Thomas Wilson, master of the British barque Kate Burrill of Yarmouth N. S. official No. 61817, who solemnly declared and stated as follows, viz:

That his vessel the Kate Burrill arrived in Rio de Janiero from Pensacola on the 30th of August, 1893, with a cargo of lumber consigned to the Companhia Industrial do Brazil; that due written notice was handed to said consignees on the 4th of September, 1893, that said vessel was ready to commence her discharge and that her lay days would commence on that date leaving 27 days for discharging which expired on the 6th of October.

That owing to the detention of the consignees the cargo was not all discharged until the 29th of November, 1893, thus delaying the vessel 53 (fifty-three) days beyond the lay days and for which demurrage is claimed to the amount of $3,158.38 as per charter-party which the consignees refuse to pay; therefore the appearer has noted this protest which he has signed at the place and date aforesaid.

THOS. WILSON, *Master.*

(Signed) W. G. ABBOTT,
H. B. M.'s Consul General.

In testimonium veritatis.
[SEAL.] British consulate, Rio de Janeiro.
December 12th, 1893.

JAMES PARK,
Acting Vice-Consul.

66 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL., Libellants, Appellants,
vs.
WILLIAM H. CROSSMAN ET AL., Respondents, Appellees.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George A. Black, being duly sworn, says: That he is the proctor for the libellants who have perfected their appeal to this court by filing their return herein on the 18th day of February, 1895.

That in the district court libellants moved to amend their libel after the district judge had overruled the libellants' exceptions to that article of the answer which set up a state of war at Rio, and a settlement with the master and with libellants' alleged agent at Rio. That in sustaining the said defense the district judge said:

"The facts stated in the answer, the truth of which must be accepted on this argument, amount in my judgment to a complete defense."

The amendments to their libel which libellants asked to make were those provided for in the 51st admiralty rule, and deponent believed that such amendment was a matter of right, and
67 was greatly surprised when the opinion of the district judge was handed down, in which it was stated as follows:

"This case has been twice heard upon exceptions by the libellants to the answer, upon the understanding—at least on the part of the court—that the hearing was to be treated as a trial of the cause, upon the admission of libellants' counsel, in open court, that the facts were correctly stated in the answer."

That while it is true that deponent in arguing the said exceptions stated that the libellants, by the mere fact of taking the exceptions, had for the purposes of the argument admitted all that was alleged in the said arcicle of the answer, yet deponent most positively affirms that he never intended to make any other or different admission. That it is true that deponent desired to have the said exception disposed of for the reason that if the said article of the answer so excepted to was held insufficient to constitute a defense, it would prevent the necessity of issuing a commission to Rio to disprove the same, but that deponent did not intend to and did not in fact state that if the said exception was overruled, the libellants did not intend to contest the matters alleged, and deponent says that the court must have misunderstood deponent on the argument of said exception, as it has already misunderstood both deponent and counsel for respondent on the previous argument, for in its opinion dated November 28, 1894, after the words "£515.6.5 was accepted in

full satisfaction and payment of all claims under the charter-party," Judge Brown said:

"It was admitted that the amount thus paid included only a portion of the demurrage which the ship would be entitled to claim for the detention beyond the lay days if the above facts were no defense."

68 That deponent called Judge Brown's attention to those words in his opinion, and asked him to strike them out on the ground that he was mistaken and that no such admission had been made. That he at first declined to do so. That deponent thereupon obtained from the proctor for the respondents who had argued that branch of the case before Judge Brown, a statement in writing that "no admission either way" had been made, and thereupon Judge Brown did strike those words from his opinion.

Deponent further says that there was delivered to him by the libellants with other papers before this action was brought a copy of the protest certified by the British acting vice-consul at Rio de Janeiro, of the master of the bark Kate Burrill, of which a copy is annexed to the affidavit of William Burrill, and the two accounts of which copies are annexed.

Deponent further says that the libellants herein reside at Yarmouth, Nova Scotia, and that none of them are within this district, which was the reason deponent did not procure their affidavit on the motion in the district court.

GEORGE A. BLACK.

Sworn to before me this 25th day of February, 1895.

LAWRENCE KNEELAND,
Notary Public, Kings Co.

[SEAL.]

Cert. filed in N. Y. Co.

Please take notice, that upon the apostles herein and the affidavits, with copies of which you are herewith served, the libellants will move this court at a stated term thereof, to be held at the court-rooms, in the post-office building, in the city of New York, on the 11th day of March, 1895, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the libellants have leave to amend their libel in the manner prayed for in their notice

69 dated December 18, 1894, contained in said apostles, or that the libellants have such other and further relief as may be just.

Dated New York, February 19, 1895.

Yours, &c.,

GEO. A. BLACK,
Proctor for Libellants.

To Messrs. Wheeler & Cortis, proctors for respondents.

(Endorsed:) U. S. circuit court of appeals for the 2nd circuit. William Burrill *et al. vs.* William Crossman *et al.* Affidavit and notice of motion. Geo. A. Black, proctor for libellants, 44 Pine street, N. Y. city. United States circuit court of appeals, second circuit. Filed Mar. 11, 1895. James C. Reed, clerk.

At a stated term of the U. S. circuit court, held at the court-rooms thereof, in the post-office building, in the city of New York, on the 18th day of March, 1895.

Present: Hon. William J. Wallace, presiding judge; Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

WILLIAM BURRILL ET AL.
vs.
WILLIAM H. CROSSMAN ET AL.

The libellants having moved to amend their libel on their
70 appeal in the manner moved for in the district court, and such motion having been heard upon the apostles and the affidavits of William Burrill and Geo. A. Black, after hearing the advocates for the respective parties, it is

Ordered, that the libellants have leave to amend their libel as moved for, and that such amendment be made within ten days from the date of this order, and that the respondents answer said amended libel within ten days after service of a copy thereof, and that the parties have leave thereafter to except or take evidence as they may be advised.

W. J. W.
E. H. L.
N. S.

(Endorsed:) U. S. circuit court of appeals for the second circuit. William Burrill *et al. vs.* William A. Crossman *et al.* Order and notice of settlement. George A. Black, proctor for def'ts, 44 Pine street, New York city. Due service of a copy of the within proposed order and motion is hereby admitted. Dated M'ch 14, 1895. Wheeler & Cortis, proct's for resp'd'ts. United States circuit court of appeals, second circuit. Filed Mar. 18, 1895. James C. Reed, clerk.

Please take notice that the within proposed order will be presented for settlement at a stated term of this court, to be held at the court-rooms, in the P. O. building, in the city of New York, on the 18th day of March, 1895, at 10.30 a. m.

Dated M'ch 14, 1895.

GEO. A. BLACK,
Lib'ts' Proctor.

To Messrs. Wheeler & Cortis, resp'ts' proctors.

71 To the Honorable William J. Wallace, presiding judge; Honorable E. Henry Lacombe and Honorable Nathaniel Shipman, judges, of the U. S. circuit court of appeals for the second circuit:

The amended libel of William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson and John R. Blauvelt, owners of the bark "Kate Burrill," of Yarmouth, Nova Scotia, against George W. Crossman and Herman Sielcken, in a cause of

contract, civil and maritime, alleges and articulately propounds as follows:

I. That at the time hereinafter mentioned, the libellants were the owners of the British bark "Kate Burrill" and resided at Yarmouth, Nova Scotia.

II. That at the time hereinafter mentioned, the respondents were copartners in business with William H. Crossman (since deceased) in the city of New York, under the firm name of W. H. Crossman & Brothers.

III. That on or about the 7th day of March, 1893, the libellant, William Burrill, was the managing owner of the bark "Kate Burrill," and on that day entered into a written charter-party with the respondents under their firm name of W. H. Crossman & Brother, whereby the said bark was chartered to the said W. H. Crossman & Brother for a voyage from Pensacola, Florida, to Rio de Janeiro, Brazil, for a full and complete cargo of pitch-pine lumber, under and upon deck, and in and by said charter it was agreed in the words following:

"Cargo to be furnished at port of loading at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at port of destination, at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, lay days to commence from the time the vessel is ready to receive or discharge her cargo, and written notice thereof is given to the party of the second part (*i. e.*, William H. Crossman & Brother), or agent, and for each
72 and every day's detention by default of the said party of the second part (*i. e.*, William H. Crossman & Brother), or agent, fifty-nine dollars and forty-six cents, U. S. gold, or its equivalent, per day, day by day, shall be paid by the said party of the second part (*i. e.*, W. Crossman & Brothers), or agent, to the said party of the first part, or agent."

That William Burrill was the party of the first part to said charter, and W. H. Crossman & Brother were the parties of the second part to said charter.

IV. That thereafter the said vessel was loaded by respondents at Pensacola with five hundred and thirty-four thousand one hundred and ninety-five superficial feet of pitch-pine lumber, of which sixty-seven thousand three hundred and thirty-three feet were loaded on deck, and thereafter sailed from Pensacola for Rio de Janeiro, where she arrived on or about the 30th day of August, 1893. That on the voyage by perils of the sea, which were duly excepted by said charter-party, 19,939 superficial feet of said deck-load were lost, and the said vessel at the time of her arrival at Rio de Janeiro had on board 514,256 feet.

V. That on the 4th of September, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Companhia Industrial do Brazil, the agent of the respondent at said port of Rio, who received the said cargo, but did not discharge the same at the average rate of not less than twenty thousand super-

ficial feet per running day, Sundays excepted, but on the contrary thereof, did not complete the said discharging until beyond the twenty-six days, Sundays exclusive, allowed for such discharge by said charter, and that demurrage therefor at the chartered rate of $59.46 per day amounts to the sum of $3,151.38, payment of which has been demanded by libellants from the respondents and refused.

VI. And by leave of the court, the libellants allege, that by the terms of the charter mentioned in the third article of the libel, it was provided as follows:

"Vessel to discharge at safe anchorage ground in Rio bay, designated by charterers."

73 VII. That at the time of giving the notice of her readiness to discharge her cargo mentioned in the fifth article, the said vessel was in fact ready to discharge upon the character designating a safe anchorage for that purpose.

VIII. That the charterer did designate an anchorage as required by said charter, and on the 5th day of September, 1893, the said vessel hauled to the anchorage designated by the charterers as being a safe anchorage for the discharge of the said cargo.

IX. That having hauled to the anchorage designated by the charterers, the said vessel did, on the 6th day of September, commence the discharge of her cargo, which portion so discharged was received by the said charterers, the said vessel lying at the anchorage theretofore designated by the said charterers as a safe anchorage.

X. That on Saturday, the 9th day of September, the said vessel continued the discharge of her said cargo, the same having been interrupted from the 6th of September to the 9th of September, by the said charterers, and on Monday, the 11th of September, again continued her discharge while yet lying at said anchorage. That at about this time, the consignee requested the said vessel to haul to a dock, and on Monday, the 11th of September, efforts were made to haul into the dock, which were not successful, on account of her draft being too great. That on Tuesday, the 12th of September, a further portion of her cargo was discharged and efforts renewed to heave her into a berth. That on Wednesday, the 13th day of September, the discharge was further continued and efforts again made to heave her into her berth. That on Thursday, the 14th of September, the discharge was further continued, and the vessel was then hove into her berth at the saw-mills in the evening, and swung alongside the wharf. That on Friday, the 15th, Saturday, the 16th, Monday, the 18th, Tuesday, the 19th, Wednesday, the 20th, Thursday, the 21st, Friday, the 22d, Saturday, the 23d, Monday, the 25th, Tuesday, the 26th, Wednesday, the 27th, Thursday, the 28th, Friday, the 29th, and Saturday, the 30th of September, the said discharge was continued, and cargo received by said charterer or consignee. That thereafter, the said consignee

74 discontinued receiving said cargo, and in consequence thereof the discharge of said vessel was suspended until Monday, the 16th of October, when it was commenced again, continued on

Tuesday, the 17th, suspended by the consignee again until Monday, the 23d, commenced again on Friday, the 27th of October, suspended again by the consignee until the 6th day of November, when it was resumed, suspended again by the consignee until the 17th of November, when it was resumed, suspended by the consignee until the 24th of November, when it was resumed, suspended again by the consignee until the 28th of November, when it was resumed and completed. That during all the aforesaid times at which the discharge of the cargo was suspended, the said vessel was ready and willing to discharge the same.

XI. Libellants allege that the total freight upon said cargo at the charter rates was the sum of £1,390–6–5. That the Compahnia Industrial do Brazil, the agent of respondents, on the — day of November, made up an account of the amount of freight due on said cargo, as per charter-party, charging for 466,862 feet at $13.50 per 1,000 feet, and for 47,394 feet at $13.50, less one-third, the said two items amounting to $6,729.17, and converted the same into pounds sterling at the rate of $4.84 to *to* the pound, amounting to £1,390–6–5, and credited themselves with £875 paid on account, leaving as the balance due for the said freight the sum of £515–6–5, which sum on or about the 7th day of December, the said Compahnia Industrial do Brazil paid Phipps Brothers & Company, to whom they had previously paid the said sum of £875 in advance. That there was no other account or payment made for the freight on said vessel and no amount paid for demurrage on said vessel, and no account of demurrage was ever stated between the said master or the said Phipps Brothers & Company and the agents of the respondents, and that the said sum of £515–6–5 was received in full of the freight so shown to be due, and for no other purpose. That on or about the 12th day of December, 1893, the master of the said vessel appeared before the British consul, the said vessel sailing under the British flag, and hailing from Nova Scotia, a province or colony of Great Britain, and made protest against the detention of the said vessel for the fifty-three days' demurrage beyond the lay days, stating in his said protest that he claimed therefor $3,159.38 as per charter, which the consignees refused to pay.

75 XII. Libellants allege that neither the captain nor the said Phipps Brothers and Company acquiesced in the said delay nor recognized the necessity therefor, nor accepted the payment of the said sum of £515–6–5 in full satisfaction and payment of all claims or demands under the said charter-party. Libellants deny that any account was made and stated between libellants and the consignees respecting all claims under the charter-party aforesaid, and the libellants deny that any balance was found due upon any accounting of demurrage claims, and libellants deny that any sum was paid by said consignee to said master or agents therefor, and libellants deny that the sum of £515–6–5 was accepted and received by them in full satisfaction of their demurrage claim.

XIII. Libellants allege that neither the master of the said vessel nor the said Phipps Brothers & Company had any authority to

enter into any accord and satisfaction with the said charterers or to receive the said sum paid for any other purpose than as payment of the freight due under said charter.

XIV. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore libellants pray that this honorable court will be pleased to decree the payments to libellants of the demurrage aforesaid, with interests and costs, and that libellants may have such other judgment or relief as may be just.

WILLIAM BURRILL.

Consulate of the United States, Yarmouth, N. S.

Sworn to before me, this 20th day of March, 1895.

CHARLES A. O'CONNOR,

[SEAL.] *Consul of the United States at Yarmouth, Nova Scotia.*

GEO. A. BLACK,

Proctor for Libellants, 44 Pine Street, New York City.

76 To the Honorable William J. Wallace, presiding judge, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges of the United States circuit court of appeals for the second circuit:

The amended answer of George W. Crossman and Herman Sielcken, respondents to the amended libel and complaint of William Burrill and others, owners of the bark "Kate Burrill," in a cause of contract, civil and maritime—

First. Denies any knowledge or information sufficient to form a belief as to the first article thereof.

Second. Admits the allegations contained in the second article thereof.

Third. Admits the making of the charter-party, as alleged in the third article thereof, substantially as is therein alleged, and annexes a copy of the said charter-party to the amended answer herein.

Fourth. Admits the allegations contained in the fourth article thereof.

Fifth. Denies each and every allegation contained in the fifth article thereof, except that it admits that the payment of $3,151.38 has been demanded by libellants from respondents, and refused.

Sixth. Admits the allegations contained in the sixth article thereof.

Seventh. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the seventh article thereof.

Eighth. Denies each and every allegation contained in the eighth article thereof.

Ninth. Denies each and every allegation contained in the ninth article thereof.

Tenth. Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the tenth article

thereof, except that it denies that said discharge was interrupted at any time by the charterer, and that any cargo was received by said charterer as is alleged in said tenth article.

77 Eleventh. Denies that the payment in the eleventh article of said libel averred was solely in discharge of the freight, and avers on information and belief that it was accepted and received in full satisfaction of all claims under said charter-party. Denies any knowledge or information sufficient to form a belief as to whether the master of said vessel appeared before the British consul on the 12th of December, 1893, and there made a protest, as alleged in the eleventh article thereof.

Twelfth. Denies each and every allegation contained in the twelfth article thereof, down to and including the words "charter-party" at the end of the fifth line in said twelfth article. As to the remaining statements contained in said twelfth article, respondents admit that libellants deny the truth of the statements therein denied, but deny that the statements are truthfully denied, and distinctly aver that said statements are true.

Thirteenth. Denies each and every allegation contained in the thirteenth article thereof.

Fourteenth. And further answering respondent alleges that the charter-party referred to in the libel herein contained a clause providing that the vessel should have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading. That said vessel was fully laden as alleged in the fourth article of the libel herein, and that thereafter, and long prior to the said 4th day of September, 1893 (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo), bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel, a copy of one of which is annexed hereto and made part hereof, and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel da Cruz & Filho, who thereby became the consignees of said cargo, and that thereupon all liability of these respondents to the owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel, upon the failure alleged in the fifth article of said libel,

78 of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of the charter-party.

Fifteenth. And further answering respondents allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same

any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay and recognized the necessity therefor.

Sixteenth. Further answering respondents allege upon information and belief that when the said cargo was delivered, the said agents of libellants accepted and received from the said consignee the sum of five hundred and fifteen pounds, six shillings and five pence, British sterling, in full satisfaction and payment of all claim and demand under the said charter-party, and an account was made and stated between said agents of libellants and the said consignees, respecting all claims under the charter-party aforesaid, and the balance due upon said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof.

Seventeenth. Denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

WHEELER & CORTIS,
Proctors for Respondents.

79 SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Crossman, being duly sworn, deposes and says: That he is one of the respondents herein; that he has read the foregoing amended answer, and the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. W. CROSSMAN.

Sworn to before me, this 4th day of April, 1895.
[SEAL.]
JAS. MOORE,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

This charter-party, made and concluded upon in the city of New York, the 7th day of March, 1893, between Wm. Burrill, managing agent for owners of the Br. bk. Kate Burrill of Yarmouth, N. S., of the burthen of 691 tons or thereabouts, register measurements, now at Barbadoes, of the first part; and Messrs. W. H. Crossman & Brother, of New York, of the second part; witnesseth, that the said party of the first part agrees on the freighting and chartering of the

whole of the said vessel (with the exception of the cabin and necessary room for the crew and stowage of provisions, sails and cables,) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Pensacola, Fla., to Rio de Janeiro, Brazil, on the terms following: The said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned, and no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part, or agent, and no lumber to be cut. The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of resawn pitch pine lumber, under and upon deck; the said party of the second part agrees to pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid:

For lumber under deck:

$13.50 thirteen and one-half dollars gold, per thousand superficial feet, inch measure, intake survey.

For lumber delivered from on deck, two-thirds of the above rate; all without primage, earned and payable on proper delivery
80 of cargo at port of discharge, in British sterling, at the rate of $4.84 gold per pound sterling, in good and approved bills on London, at usance, or in cash at the current rate of exchange for the same at master's option, without credit or discount.

If required by charterers, lay days for loading not to commence before April 10th, 1893.

Vessel to proceed with all possible despatch direct to port of loading to enter upon this charter.

Vessel to haul once to loading berth, as may be required by charterers, or their agents, who have the privilege of moving her afterward by paying the additional towage.

Cargo to be furnished at port of loading at the average rate of not less than (20 M) twenty thousand superficial running feet per running day, Sundays excepted, and to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, ($59.46) fifty-nine $\frac{46}{100}$ dollars U. S. gold (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading, within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage ground in Rio bay designated by charterers.

The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash,

less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed.

The vessel to be consigned to the charterers' agents at port
81 of discharge, inwards only, paying them a consignment commission of 2½ per cent. on the amount of this charter for doing vessel's inward business.

The dangers of the seas, fires and navigation, of every nature and kind, always mutually excepted.

To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other, in the penal sum of the estimated amount of freight.

In witness whereof, we hereunto set our hands the day and year above written.

A commission of five per cent. upon the gross amount of this charter and demurrage, payable by the vessel and owners, due to Paul F. Gerhard & Co. and Edward Hinken's Sons upon the signing hereof, vessel lost or not lost, charter cancelled or uncancelled.

(Signed) WM. BURRILL.
W. H. CROSSMAN & BRO.

We hereby certify that this is a correct copy of the original charter-party now in our possession.

PAUL F. GERHARD & CO., *Brokers.*
By F. I. ZIMMERMANN, *Attorney.*

82

W. H. Crossman & Bro., shipping and commission merchants, New York.

Shipped in good order and well conditioned by W. H. Crossman & Bro., on board the bark called the Kate Burrill, whereof T. Wilson is master, now lying in the port of Pensacola, and bound for Rio de Janeiro, to say:

Marks.	Pieces.	Lumber.	S. ft.
		Eight thousand seven hundred and eighty-nine pieces p. p. Rio deals, containing five hundred and thirty-four thousand one hundred and ninety-five superficial feet.	
		Of the above lumber one thousand and two (1,002) pieces are on deck, containing sixty-seven thousand three hundred and thirty-three (67,333) superficial feet. Measurement unknown to master.	
Total, 8,789 pieces.			Total, 534,195.

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Rio de Janeiro (the dangers of the seas, fire, and collision excepted) unto order or to their assigns, they paying freight for the said lumber as per charter-party, dated 7th March, 1893, and average accustomed.

In witness hereof, the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in Pensacola, the 5th day of May, 1893.

T. WILSON.

(In red ink: Consignors' copy. Not negotiable.)

83 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

Exceptions to Answer.

Libellants except to the answer herein as follows:

I. To the 11th article thereof, on the ground that the same does not answer separately each separate allegation and matter contained in the 11th article of the libel, and in that the same omits to answer any but the last two allegations of said article, as required by the 23d and 27th admiralty rules of the U. S. Supreme Court.

II. Libellants except to the 14th article of said answer on the ground that the same is insufficient in the law to constitute a defence.

III. Libellants except to the 15th article of said answer, on the ground that the same is insufficient in the law to constitute a defence.

IV. Libellants except to the 16th article of said answer on the ground that the same is insufficient in the law to constitute a defence.

GEO. A. BLACK,
Proctor for Libellants, 44 Pine St., N. Y. City.

84 U. S. Circuit Court of Appeals, Second Circuit.

BURRILL ET AL., Appellants,
vs.
CROSSMAN ET AL., Appellees.

WALLACE, *Circuit Judge:*

Leave was granted to the appellants by this court to make new allegations in their libel, and the appellees having answered, the

appellants have filed exceptions to several of the articles of the a
swer upon the ground that the same are insufficient in law to con
stitute a defense. While there is no formal rule which sanction
this practice, the rules for appeals in admiralty only permitting new
allegations in pleading and new proof, and while there are objection
to a practice which may require an appellate tribunal to decide
cause in fragments, inasmuch as no objection has been made on th
part of the appellee-, and the exceptions raise important question
of law, the determination of which may relieve the parties from th
delay and expense of introducing the proofs, we proceed to examin
the exceptions, but without intending to commit the court when th
question may hereafter arise as to the propriety of the practice. W
shall not, however, consider the first exception, which relates merely
to a matter of form and does not involve substance.

The libel was filed by the owners of the bark Kate Burrill
85 to recover of the charterers fifty-three days' demurrage for
her detention at Rio de Janeiro in unloading a cargo of lumber
The charter-party was for a voyage from Pensacola, Florida, to Rio
de Janeiro, Brazil. It provided that the vessel should be consigned
to charterers' agents at port of discharge, and be discharged at the
rate of twenty thousand feet (of lumber) per day, lay days to com-
mence from the time the vessel should be ready to discharge the
cargo, and written notice thereof given to the charterers or their
agents; and that for each day of detention by default of the char-
terers or their agents $59.46 should be paid, vessel to discharge at
safe anchorage ground in Rio bay, designated by charterers or their
agents. It also contained the following clause: "The bills of lading
to be signed as presented without prejudice to this charter. Any
difference in freight to be settled before the vessel's departure from
port of loading. If in vessel's favor, in cash, less insurance. If in
charterers' favor, by captain's draft upon his consignees, payable ten
days after arrival of vessel at port of discharge. Vessel to have
absolute lien upon the cargo for all freight, dead freight and de-
murrage; charterers' responsibility to cease when the vessel is loaded
and bills of lading are signed."

The libel alleges that the vessel arrived at Rio de Janeiro, having
on board 514,256 feet of lumber, September 4, 1893, and duly gave
notice to the agents of the charterers that she was ready to discharge
and the vessel was in fact ready to discharge at that time; that the
charterers designated an anchorage as required by the charter, and
on the 5th day of September, 1893, the vessel hauled to the anchorage,
and on the 6th day of September commenced the discharge of her
cargo. It then alleges that for various periods of time between that
date and the 28th day of November, 1893, aggregating fifty-three
days, the discharge of the vessel was suspended by the consignees,
and that during all the time of suspension the vessel was ready and
willing to discharge.

86 The answer alleges that when the vessel was laden bills of
lading of similar tenor for the whole of the cargo were duly
signed by the master of the vessel, which bills of lading were duly
transferred to parties who became consignees of the cargo, and that

thereupon all liability of the charterers to the owners of the vessel under the charter-party ceased, and it became the duty of the master and owner of the vessel upon the failure of the consignees to discharge her pursuant to the terms of the charter-party to notify said consignees of the amount of demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid. The answer further alleges that when the vessel arrived at Rio de Janeiro the consignees of the cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom; that the libellants were prevented from discharging the cargo, and the respondents were prevented from receiving the same, any sooner than was done, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio de Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil; that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by said acts of the public enemy and not by any default of the respondents. It also alleges that the master of the vessel and the agents of the libellants acquiesced in the delay and recognized the necessity thereof; and that when the cargo was delivered the agents of the libellants accepted and received from said consignees a sum mentioned in full satisfaction and payment of all claim and demand under said charter-party, and an account was made and stated between them and the consignees respecting all claims
87 under the charter-party aforesaid, and the balance due upon said accounting was paid by the said consignee- to the said agents, and accepted and received by them in full satisfaction thereof. The answer sets forth a copy of one of the bills of lading. The bill of lading shows a shipment of cargo by the charterers, and provides for the delivery of the cargo upon the order of the charterers, or to their assigns, "they paying freight for the said lumber as per charter-party."

The second exception to the answer is to that part which relies upon the defense, that the liability of the charterers was to cease upon the loading of the cargo and signing of bills of lading. The question thus presented has been considered in the court below, and we concur in the opinion of the learned district judge in respect to it. That opinion so fully and satisfactorily discusses the question that we quote it, and deem it unnecessary to enlarge upon it. Judge Brown said: The provisions of the charter-party are in form contradictory. One clause declares that for every detention by default in receiving or discharging the cargo by said parties of the second part, or agent (the respondents), the demurrage, as above specified, shall be paid by them. The other clause declares that their responsibility shall cease when the vessel is loaded and bills of lading are signed. A previous clause also provided that the cargo should be discharged at the port of destination at the rate of 20,000 — per day.

The general intent of these provisions taken together manifestly is that the ship shall be paid, not only freight but demurrage for detention beyond the stipulated time in discharging. The various clauses of the charter in this regard should be interpreted consistently, so far as possible, with the general purpose, as well as with its further presumed purpose to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship, by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and
88 demurrage, has it in her power to enforce payment of her claims by means of that lien without a resort to the charterers. In the cases of Clink *v.* Radford (1891), 1 Q. B., 625, and Hansen *v.* Harrold (1894), 1 Q. B., 612, the relation of these clauses to each other have been recently carefully considered in the English court of appeal, and the rule laid down is that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated; and that where "the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply, in so far as the lien, which by the charter-party the charterers are enabled to create, is not equivalent to the liability of the charterers;" and that "where the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien, which can be exercised by the ship-owner, is commensurate with such liability."

This is substantially the construction that was given by this court to the cesser clause in the case of Hatton *v.* The Belaunzaran, 26 Fed. Rep., 780, where notwithstanding the cesser clause the charterer was held liable to pay demurrage, because under the right to effect a subcharter he had required the ship to take a cargo of salt not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

In the present case the respondents, as charterers, had the right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter; it means only that the charterers' obligations to the ship and owners should not be affected by the terms
89 of the bill of lading thus signed on the charterers' requirement (Gledstanes *v.* Allen, 12 C. B., 202).

The bill of lading for the lumber in question provided for "paying freight for said lumber as per charter-party dated 7th March, 1893, and average accustomed." A bill of lading in this form imposed upon the endorsee of the bill of lading who received the goods under it, none of the stipulations of the charter except such as pertained to the payment of freight (Chappell *v.* Comfort, 10 Com. B. (N. S.), 801; Smith *v.* Sieveking, 4th El. and B., 945; Fry *v.* Chartered Bank, L. R., 1 C. B., 689; Dayton *v.* Parke, 142 N. Y., 391, 400). It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per

day, or in default thereof pay a specified price per day for any further detention of the vessel. Under this bill of lading, the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages, for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention from whatever cause, and agrees upon a specified rate of damages.

Had the bill of lading provided for the payment of freight and "all other conditions as per charter-party," the latter provision would have been construed *ejusdem generis* as imposing upon the consignee the payment of something more than freight, and would have included the obligations referred to in the charter-party respecting the rate of delivery and the payment of the demurrage specified, though not necessarily including independent provisions of the charter-party relating to different subjects, Russell *v.* Nieman, 17 Com. B. (N. S.), 162; Serraino *v.* Campbell, 25 Q. B. D., 501; S. C. 1891, 1 Q. B., 283; Wagener *v.* Smith, 15 C. B., 285; Portus *v.* Whortly (L. R., 3 Q. B. Dig., 534).

90 What the respondents, therefore, in this case virtually required the master to do was to give a bill of lading for this lumber that required the master to deliver it to the endorsee of the bill of lading, without the payment of any charter demurrage at all, such as the respondents had agreed should be paid; but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently, or by design, is immaterial as respects the ship. For the ship could only claim of the vendee according to the bill of lading (the H. G. Johnson, 48 Fed. Rep., 696). The bill of lading required the ship to deliver the cargo contrary to that provision of the charter, which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause and the lien clauses were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage, by presenting and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses."

The third exception to the answer is to that part which sets up the defense that the detention of the vessel beyond the charter period of discharging was caused by the acts of the public enemy, and not by the default of the charterers. The provision in the charter that the cargo was to be discharged at the rate of a specified quantity per day is the equivalent of the one frequently incorporated into such instruments, conditioned for the discharge of the cargo within a specified time. "When the time is definitely fixed, or is described

so as to be calculable beforehand, there is an absolute obliga-
91 tion on the charterer to have the work completed within that period whatever circumstances occur. He is answerable, although the completion may have become impossible, owing to causes which have arisen without any fault or omission on his part. Thus he bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge, Randall *v.* Lynch (2 Camp., 352); or from frost, Barrett *v.* Dulton (4 Camp., 333); or bad weather, Thiis *v.* Byers (1 Q. B. D., 244), preventing access to the vessel; or from acts of the government of the place prohibiting export, or preventing communication with the ship, Parker *v.* Hodgson (3 M. and S., 267), Blight *v.* Page (3 B. and P., 295, *n.*); and it is immaterial that the ship-owner also is prevented from doing his part of the work within the agreed time, unless he is in fault. The charterer takes the risk" (Carver on Carriage by Sea, sections 610, 611). The doctrine thus stated has been frequently declared in the adjudications. Thus in Davis *v.* Wallace (3 Clifford, 131) it was said: "The settled rule is that where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, that such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. Where the contract is that the ship shall be unladen within a certain number of days, it is no defense to an action for demurrage that the overdelay was occasioned by the crowded state of the docks or by port regulations, or government restraints. Detention of the vessel for loading or discharging longer than the time allowed by the contract entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time by natural causes." To the same effect
are the following authorities: Cargo ex Argos (5 P. C., 161);
92 Waugh *v.* Morris (L. R., 8 Q. B., 202); Davies *v.* McVeagh (4 Ex. Div., 265); Postlethwaite *v.* Freeland (5 Ap. C., 617); Leer *v.* Yates (3 Taunt., 387); Grant *v.* Coverdale (9 P. C., 470); Budgett *v.* Binnington (25 Q. B. D., 320).

The appellee cites several decisions holding that where a failure to perform is caused by *vis major* demurrage is not recovable: Ford *v.* Cotesworth (L. R., 4 Q. B., 127; *id.*, 5 Q. B., 544); Cunningham *v.* Dunn (3 C. P. D., 443); Riley *v.* Cargo of Iron Pipes (40 Fed. Rep., 605); the J. E. Owens (54 Fed. Rep., 185); Dahl *v.* Nelson (6 Ap. Cas., 38); Carsenago *v.* Wheeler (16 Fed. Rep., 248): the Spartan (25 Fed. Rep., 44). It suffices to say that these were cases in which no specified time was fixed by the contract within which the vessel should be discharged, but the contract provided for a discharge with customary despatch, or for a discharge after a precedent condition, such as the arrival of the ship in a proper discharging berth. Undoubtedly when the contract is silent on the subject of demurrage, it is only recoverable when made to appear that she was not discharged with customary diligence, because of some

fault or negligence on the part of the consignee, and in such a case the defense of *vis major* is a perfect answer to the action.

It is contended for the appellee- that the charterers are not liable in the present case, because by the language of the charter-party demurrage is payable only "for each day of detention by default of the charterers or their agents;" that default means negligence or willful omission; and that the facts alleged in the answer sufficiently excuse the charterers. In one sense any failure is a default, whether it arises from the omission to perform a contract or from a neglect of duty. In many reported cases the omission to pay a debt or to perform a contract is spoken of as a default. We think it was used in that sense in the present contract. In 1,600 Tons of Nitrate of Soda *v.* McLeod (61 Fed. Rep., 849), it was decided by the circuit court of appeals for the ninth circuit that a
93 charter-party which made the charterer liable for demurrage, only when caused by his default, did not relieve him from liability for delay caused by omission to perform his covenants, even though he was not guilty of negligence. The clause in the charter-party in that case was expressed identically as in the present charter-party.

The fourth exception is to that part of the answer which sets up payment of £515, 6s. 5d. to the agents of the libellants, when the cargo was delivered, in full satisfaction of all claims and demands under the charter-party. The argument advanced to sustain this exception is that the answer does not aver that the agents of the libellants to whom the payment was made had authority to accept a sum which did not include the full claim for demurrage. It suffices to meet this argument, and to dispose of the exception, that the thirteenth article of the libel states by way of an anticipatory averment that the agents had no authority to enter into any accord and satisfaction with the charterers, or to receive the sum paid for any purpose except as a payment for freight, and the answer denies this statement. This denial is the equivalent of an affirmative averment. Upon the allegations in the libel and answer the question whether there was an accord and satisfaction made by those having authority to represent the libellants therefor, is a question of fact to be determined upon a view of all the incidents of the transaction when the proofs are before the court.

We conclude that the second and third exceptions should be sustained, and the other exceptions overruled.

Ordered accordingly.

(Endorsed): U. S. cir. ct. of appeals, 2nd cir. Burrill *et al.*, appellants, *vs.* Crossman *et al.*, appellees. Wallace, C. J. United States circuit court of appeals, second circuit. James C. Reed, clerk.

94 At a stated term of the United States circuit court of appeals for the second circuit, held at the court-rooms thereof at the post-office building, in the city of New York, on the 11th day of November, 1895.

Present: Hon. William J. Wallace, P. J.; Hon. E. Henry Lacombe, J.; Hon. Nathaniel Shipman, J.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

The exceptions filed by the libellants to the amended answer of the respondents herein having been argued by the advocates for the respective parties, and due deliberation had thereon, it is, on motion of Geo. A. Black, proctor for the libellants,

Ordered (1.) That the court declines to consider the first exception of the libellants to the 11th article of the answer.

(2.) That the second exception to the 14th article of the said answer specifying that the same is insufficient in the law to constitute a defense is sustained.

(3.) That the third exception to the 15th article of the answer stating that the same is insufficient in the law to constitute a defense is sustained.

(4.) That the court overrules the fourth exception to the 16th article of the answer.

W. J. W.
E. H. L.
N. S.

95 Please take notice that the foregoing proposed order will be presented to this court at the opening thereof on the 11th day of November, 1895, for settlement and entry herein.

Dated November —, 1895.

Yours, &c.,

GEO. A. BLACK,
Proctor for Libellants.

(Endorsed:) U. S. circuit court of appeals for the 2d circuit. William Burrill *et al. vs.* George W. Crossman *et al.* Order. George A. Black, proctor lblts., 44 Pine street, New York city. United States circuit court of appeals, second circuit. Filed Dec. 5, 1895. James C. Reed, clerk.

At a stated term of the U. S. circuit court of appeals for the second circuit, held at the court-rooms, in the city of New York, on the 1st day of February, 1897.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

WILLIAM BURRILL ET AL.
vs.
GEORGE W. CROSSMAN ET AL.

Upon reading and filing the annexed consent, it is

Ordered, that Black & Kneeland be and they are hereby substituted as proctors for the libellants in the above-entitled action in the place and stead of George A. Black, deceased.

96 U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL, JAMES BURRILL, ISRAEL K. BURRILL, ROBERT Caie, William D. Robertson, and John R. Blauvelt, Libellants,

vs.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, Respondents.

It is hereby consented that Black & Kneeland be substituted as proctors for the libellants herein in the place and stead of George A. Black, deceased.

WILLIAM BURRILL.

Dated January 25, 1897.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 25th day of January, 1897, before me personally appear- William Burrill, known to me to be one of the libellants above named and to be the person who executed the above consent and acknowledged that he executed the same.

LAWRENCE KNEELAND,

[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

(Endorsed:) U. S. circuit court of appeals, second circuit. William Burrill *et al. vs.* George W. Crossman *et al.* Consent &
97 order for substitution. Black & Kneeland, proctors for lib'ts, 44 Pine street, New York city. United States circuit court of appeals, second circuit. Filed Feb. 1, 1897. James C. Reed, clerk.

At a stated term of the U. S. circuit court of appeals for the second circuit, held at the court-rooms in the post-office building, in the city of New York, on the — day of September, 1897.

Present: Hon. William J. Wallace, presiding justice; Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, justices.

WILLIAM BURRILL and Others
against
GEORGE W. CROSSMAN and Others.

Upon the annexed consent of Messrs. Black & Kneeland, proctors for the libellants, and on motion of Wheeler & Cortis, proctors for the respondents herein, it is—

Ordered that a commission issue in this action directed to the American consul or vice-consul at Rio Janeiro, Brazil, to examine under oath, upon interrogatories and cross-interrogatories thereto annexed, certain employees of the Companhia Industrial do
98 Brazil in 1893, who had charge of the interest of W. H. Crossman & Brother in the consignment on the Kate Burrill, arriving at Rio Janeiro on or about August 30, 1893, whose testimony appears to the respondents herein to be material to the issues,

and that the libellants be at liberty to join in said commission. And it is further—

Ordered that said commission when executed shall be returned without delay to William Parkin, Esq., clerk of the U. S. circuit court of appeals for the second circuit, at the city of New York, State of New York.

E. H. L.

The entry of the foregoing order is hereby consented to.
New York, September 30, 1897.

BLACK & KNEELAND,
Proctors for Libellants.

(Endorsed:) U. S. circuit court of appeals for the second circuit. William Burrill and others against William H. Crossman and others. Consent and order for commission. Wheeler & Cortis, proctors for respondents; office and post-office address, 45 Broadway, New York city, N. Y. United States circuit court of appeals, second circuit. Filed Oct. 5, 1897. William Parkin, clerk.

99 United States District Court, Southern District of New York.

WILLIAM BURRILL ET AL., Libellants,
against
GEORGE W. CROSSMAN ET AL., Respondents.

It is hereby consented and agreed that the interrogatories and cross-interrogatories to certain employees of the Companhia Industrial do Brazil, who had charge of the interest of W. H. Crossman & Brother in the consignment of the Kate Burrill, arriving in Rio Janeiro about August 30, 1893, of Rio de Janeiro, Brazil, as heretofore served upon the proctors for the respective parties herein, be used upon the commission about to issue to Rio de Janeiro, Brazil, and that all objections to such interrogatories and cross-interrogatories as to form are hereby waived and the same are hereby settled.

Dated New York, October 23, 1897.

BLACK & KNEELAND,
Proctors for Libellants.
WHEELER & CORTIS,
Proctors for Respondents.

(Endorsed:) U. S. district court, southern district of N. Y. William Burrill *et al.*, libellants, against George W. Crossman *et al.*, respondents. Consent. Wheeler & Cortis; office and post-office address, 45 Broadway, New York city, N. Y. United States circuit court of appeals, second circuit. Filed Oct. 30, 1897. William Parkin, clerk.

100 The President of the United States of America to the American consul or vice-consul at Rio Janeiro, Brazil, greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner and by these presents do give you and either of you full power and authority, diligently to examine upon their corporal oath, or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed—

Certain employees of the Companhia Industrial do Brazil in 1893, who had charge of the interest of W. H. Crossman & Bro. in the consignment on the Kate Burrill, arriving at Rio Janeiro on or about August 30, 1893, as witnesses on the part of the respondents in a certain cause now pending undetermined in the United States circuit court of appeals of the United States of America for the second circuit, southern district of New York, wherein William Burrill and others are libellants against George W. Crossman and others, respondents. And we do further impower you, and either of you, to examine on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you; and we do hereby require you and either of you before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to William Parkin, clerk of the circuit court of appeals of the United States for the 2d circuit, at the city of New York, as soon as may be convenient after the execution of this commission; and that you return the same when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorables Wm. J. Wallace, E. Henry La-
101 combe, Nathaniel Shipman, justices of the circuit court of appeals of the United States for the 2d circuit, at the city of New York, this 29th day of October, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second.

WM. PARKIN,

[SEAL.] *Clerk of the U. S. Circuit Court of Appeals for the Second Circuit.*

United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
against
GEORGE W. CROSSMAN ET AL.

Interrogatories to be directed to certain employees of the Companhia Industrial do Brazil, who had charge of the interest of W. H. Crossman & Brother in the consignment of Kate Burrill, arriving in Rio Janeiro about August 30, 1893, of Rio Janeiro, on behalf of the respondents.

First interrogatory. What is your age, residence and occupation?
Second interrogatory. Do you remember the arrival of the bark

Kate Burrill at Rio Janeiro, from Pensacola, in August or September, 1893? Did you know of her remaining there after that date; and, if so, how long?

Third interrogatory. What was your employment or business at that time?

Fourth interrogatory. State what letter, if any, you re-
102 ceived from Phipps Brothers & Co. respecting their authority from the owners of said bark to act for her and transact the business of the ship. If you received such a letter, state when you received it, and annex the original or a copy thereof to your answer?

Fifth interrogatory. State what diligence was used by the consignees of the cargo of the Kate Burrill; that is to say, the Companhia Industrial do Brazil, in regard to receiving the cargo of the Kate Burrill, and taking the same away as it was discharged from the ship?

Sixth interrogatory. State whether or not said company had warehouse room in which to stow the cargo as fast as it was received from the ship?

Seventh interrogatory. State whether or not the captain of said vessel, Thomas Wilson, made any complaint to you or to anybody else to your knowledge, in regard to any alleged delay in the matter of receiving the said cargo by the consignees or in the matter of their discharging said cargo; if so, what did he say and to whom did he say it, and what answer was made? State the conversation as fully as you can and according to your best recollection.

Eighth interrogatory. State whether or not in the course of said conversation or conversations the consignees of said cargo said there was no room to put the lumber away on account of the trouble, or that they couldn't get the lumber clear of the saw-mill, or that they weren't selling their lumber, or that when the other vessel was there the place was filled up; that there was no place to put the lumber, or anything to that effect?

Ninth interrogatory. State whether or not the said captain made any claim upon the said consignees of the cargo for demurrage claimed to be due under the charter-party of said bark, or otherwise, by reason of delay in discharging the cargo from the said ship, or said anything to said consignees on said subject, and if so, what?

103 Tenth interrogatory. State whether or not the consignees of said ship, Phipps Bros. & Company, or any other persons for the said ship, said or wrote anything to the consignees of said cargo respecting any claim for demurrage alleged to be due under said charter-party, and if so, when and what was it? State whether or not it was said or written, if at all, before the payment hereafter mentioned? If it was in writing, annex the original or a copy thereof to your answer.

Eleventh interrogatory. The said captain made the following entry in his protest at Rio Janeiro, in December, 1893: "Demurrage is claimed to the amount of $3,158.38, as per charter-party, which the consignees refused to pay." State, according to your best recol-

lection, what took place at the time such claim, if any, was made, and at the time of such refusal?

Twelfth interrogatory. State whether or not any payment was made by the Companhia Industrial do Brazil, or by any persons on their behalf, to the consignees of said ship respecting the amount due under the charter-party for the carriage of the cargo upon the voyage from Pensacola to Rio, mentioned in the second interrogatory?

Thirteenth interrogatory. State fully what took place upon such payment, or prior thereto, respecting the amount to be paid, and what receipt, if any, was delivered thereupon?

Fourteenth interrogatory. State particularly whether or not the payment so made, if you say one was made, was paid by the said companhia and accepted by the consignees of said ship in full satisfaction for all claims under the said charter-party? State fully all that took place respecting the same?

Fifteenth interrogatory. State whether or not when said cargo was from day to day delivered to the said consignees thereof, any lien thereon for demurrage was claimed by the said captain or
104 the said consignees of said ship. State whether or not any such lien was claimed at any time, or whether any steps were ever taken by said captain or said consignees of the ship to enforce any such lien.

Sixteenth interrogatory. If you know any other matter or thing material to the issues and favorable to the respondents, state the same as fully and particularly as if you were interrogated in relation thereto.

(Endorsed:) U. S. circuit court of appeals for the second circuit. William Burrill *et al.* against George W. Crossman *et al.* Interrogatories. Wheeler & Cortis, proctors for respondents; office and post-office address, 45 Broadway, New York city N. Y.

Deposition of witness produced, affirmed, and examined the fourteenth day of April, in the year one thousand eight hundred and ninety-eight, at Rio de Janeiro, office of American consul general, under and by virtue of a commission issued out of the circuit court of appeals of the United States for the second circuit of New York, in a certain cause therein depending and at issue wherein William Burrill and others, owners of the bark Kate Burrill, are libellants, against George W. Crossman and Herman Sielchen, respondents.

Edwin Elkin Hime, of Rio de Janeiro, office 32 Rua Theophilo Ottoni, a merchant, aged fifty-two years and upwards, being duly and publicly affirmed, pursuant to the directions hereto annexed, and examined on the part of the respondents, doth depose and say as follows:

First. To the first interrogatory he saith, "I am fifty-two years of age, and live in Rio de Janeiro. Office being 32 Rua Theophilo Ottoni."

105 Second. To the second interrogatory he saith, "The Kate Burrill arrived on the 30th of August, one thousand eight hundred and ninety-three, and concluded her discharging on the 20th of November. I do not know her date of sailing."

Third. To the third interrogatory he saith, "I was a director of the Companhia Industrial do Brazil."

Fourth. To the fourth interrogatory he saith, "The Companhia Industrial do Brazil did receive a letter from Messrs. Phipps Brothers & Company, and I, as director, received it. In it they stated that they were the attorneys for the owners of the Kate Burrill, and I believe they (Messrs. Phipps Bros. & Co.) instructed us to hand the vessel over to them, which as far as I can recollect I refused to do, as the vessel and cargo were both consigned to the Companhia Industrial do Brazil. They also instructed Companhia I. do B. that they were not to give the captain any money, and that the accounts of the vessel had to be liquidated with them (Messrs. P. Bro. & Co.) and not with the captain. The Companhia Industrial do Brazil received two letters, one before and one after the arrival of the vessel, as far as I can recollect. I cannot find the letters and cannot recollect the date exactly, and cannot therefore, annex the original or a copy to this document."

Fifth. To the fifth interrogatory he saith, "The cargo was sold by the consignees to the saw-mill belonging to Mr. Berrogam, and the Kate Burrill went alongside the wharf of said saw-mill on the fourth of September, 1893. In the usual course of events the saw-mill would have received the quantity or more as stipulated in the charter-party."

Sixth. To the sixth interrogatory he saith, "Certainly, the said owners of the saw-mill had sufficient storage to stow the whole of the cargo as fast as delivered by the vessel."

106 Seventh. To the seventh interrogatory he saith, "The captain of the vessel, Thomas Wilson, did complain that he could not discharge the cargo as fast, or in accordance with the charter-party, owing to prohibitory orders on the part of the government, there being a revolution against the government at the time, and firing in this particular locality being exceedingly heavy and injuring life and property. This complaint was made to me, and I replied to it that I could not help him in the matter, and that he had to obey the government's orders, as I had to. This is my best recollection of the matter."

Eighth. To the eighth interrogatory he saith, "No mention was made in the conversation with regard to there being no room for storing the cargo; nor that they could not get the lumber clear of the saw-mill; nor that they were not selling their lumber. As far as I can recollect there was no other vessel there. There was nothing said about there being no place to put the lumber, nor anything to that effect."

Ninth. To the ninth interrogatory he saith, "The captain did mention something with regard to demurrage, and I replied to him that in conformity with his charter-party he had to deliver the cargo on shore, and as he had contracted to discharge the same (that

is, going alongside the wharf instead of doing the discharging into lighters), I had nothing to do with it."

Tenth. To the tenth interrogatory he saith, "No claim was ever presented to the Companhia Industrial do Brazil or to me as director, either by the captain or by Messrs. Phipps Bros. & Co. as attorneys for the owners of the vessel, either verbally or in writing."

Eleventh. To the eleventh interrogatory he saith, "The Com-
panhia never refused to pay the demurrage claim, as it was
107 never presented to them either by the captain or by Messrs.
P. Bros. & Co., nor had they cognizance of any such protest having been made by the captain."

Twelfth. To the twelfth interrogatory he saith, "All payments were made to Messrs. Phipps Bros. & Co. in accordance with accounts presented to them. First payment having been to the amount of £875; and the second payment, balance due as per account rendered. The last payment having been made on December 7, 1893, in accordance with receipt in our possession, which receipt was signed without any restriction whatever by Messrs. Phipps Bros. & Co., and is a receipt in full satisfaction of all claims."

Thirteenth. To the thirteenth interrogatory he saith, "No questions were raised by Messrs. Phipps Bros. & Co. with regard to the accounts presented by us, and balance was received by Messrs. P. Bro. & Co., as the Companhia Industrial do Brazil had a right to presume, in full settlement of all accounts."

Fourteenth. To the fourteenth interrogatory he saith, "I here confirm what I have already stated in interrogatories No. 12 and 13."

Fifteenth. To the fifteenth interrogatory he saith, "As stated before, the vessel went alongside the wharf on the 4th of September, and she concluded discharging her cargo on the 20th of November, and during that time no lien or claim was made for demurrage, either by the captain or by Messrs. Phipps Bro. & Co., and consequently no steps were taken to enforce such lien."

Sixteenth. To the sixteenth interrogatory he saith, "All I can say is that I am exceedingly astonished and surprised that such a suit should be brought against the charterers of the vessel, as by the terms of the charter-party, it is conclusive that once the cargo is on
board and the bills of lading signed, the charterers' responsi-
108 bility ceases, the captain having lien on the cargo for freight
and any and every other claim. The Kate Burrill arrived just at the commencement of the revolution, which lasted until March of the following year, and during that time the Companhia Industrial do Brazil had the following vessels, all under the same style charter-party and all loaded with pitch-pine deals. That is, the British America, Captain H. H. Steel; the Don Enrique, Captain J. H. Wright, and the City of Montreal, Captain Greene, and although the three vessels were delayed here in consequence of the revolution, no claim has been made for demurrage. I further state that when settling with Messrs. Phipps Brothers & Co., I was certainly under the impression that when they received the balance due the vessel in accordance with the receipt passed by them, it was in final

settlement of all amounts due to the vessel in conformity with the charter-party."

EDWIN E. HIME.

U. S. Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
against
GEORGE W. CROSSMAN ET AL.

Cross-interrogatories to be Propounded to the Employees of the Companhia Industrial do Brazil Examined under Commission Herein.

I. State, if you know, the date of the arrival of the bark Kate Burrill at Rio de Janeiro?

109 II. If in answer to the third direct interrogatory you say that you were in the employ of the Companhia Industrial do Brazil in September, 1893, state what position you held and what the duties of your position were?

III. Did not the Companhia Industrial do Brazil direct the captain of the bark Kate Burrill to discharge his cargo at the saw-mill?

IV. When was the discharge of the cargo of the Kate Burrill commenced, and when was it completed?

V. If in answer to the 6th direct interrogatory, you state that the Companhia Industrial do Brazil had warehouse-room, in which to stow the cargo as fast as it was received from the ship, state where such warehouse-room was situated and where the cargo was stowed as it was discharged from the ship?

VI. Was cargo received by the Companhia Industrial do Brazil from the Kate Burrill on every day, Sundays excepted, between the date of the commencement of the discharge and the date of the completion of same; if not state, if you know, on what days cargo was received from said vessel and how much was received on each day?

VII. At the time the bark Kate Burrill arrived at the saw-mill, was any other vessel then discharging cargo there? If yea, state the name of said vessel, and how long she had been there at the time the Kate Burrill arrived?

VIII. During the time the bark Kate Burrill was discharging her cargo at the saw-mill, state whether or not any other vessel came there for the purpose of discharging her cargo, and when her cargo was discharged?

110 IX. If in answer to the 12th direct interrogatory you say that payment was made by the Companhia Industrial do Brazil, or by any person on its behalf, to the consignees of the ship for carriage of her cargo, state when such payment or payments were made and the amount of same?

X. Did not the Companhia Industrial do Brazil pay to Phipps Bros. & Co. on or about the 10th day of November, 1893, the sum of R. 20,000,000, and did not said company pay to said Phipps Bros. & Co. on or about the 7th day of December, 1893, the sum of

R. 6,770,230? State whether any other payment was made by the Companhia Industrial do Brazil to Phipps Bros. & Co. for the carriage of the cargo of the Kate Burrill?

XI. If in answer to the 13th interrogatory you say that a receipt was delivered upon payment by the Companhia Industrial do Brazil, please produce such receipt and have a copy of the same annexed to your deposition.

XII. Did not the Companhia Industrial do Brazil in November or December, 1893, render to Phipps Brothers & Co. an account showing the disbursements incurred by them, as inward consignees of the vessel and balance due the vessel? If yea, produce a copy of such account and have the same annexed to your deposition.

XIII. Look at the paper annexed hereto and marked Exhibit A and state whether or not the said paper is not a true copy of an account rendered by the Companhia Industrial do Brazil to Phipps Brothers & Co. in the month of November or December, 1893; and whether the balance of R. 6,770,230 shown thereon was not paid to Phipps Brothers & Co. at or about the time of the rendering of such account?

111 XIV. Has the Companhia Industrial do Brazil received from the firm of W. H. Crossman & Brother, or from any one in their behalf, any letters or communications concerning the testimony that you were to give in this matter; if yea, produce copies of such letters or communications and have the same annexed to your deposition, and say if you have done so?

BLACK & KNEELAND,
Proctors for Libellants, 44 Pine Street, New York City.

EXHIBIT A.

Companhia Uniad Mercantil, successora de Monteiro, Hime & C., Miranda, Guimaraes & C., Marinho, Reis & C., 32 Rua Theophilo Ottoni 32 Rio de Janeiro Caixo N. 593.

RIO DE JANEIRO, *November*, 1893.

The B. B. Kate Burrill, 691 tons, Captain Wilson, in account with the Comp[a] Industrial do Brazil, consignee.

To entry at custom-house & captain of the port.....	R. 40,000
" conferring manifest & list of stores...	40,000
" translation of manifest & copy.....	22,500
" stamps.....	50,000
" lighterage ac.....	4,081,400
" towage ac.....	112,500
" cash to captain.....	
" commission on inward freight, 2½ % on £1,390–6–5 = £34.15.2 at 10$\frac{3}{4}$...	804,050
" commission on outward freight.....	
" ship chandler's ac.....	

112 To outward charges..... .....
" clearance at custom-house & captain of the port.....
To stevedore's ac..... ....
" ballast ac..... ... .

R. 5,150,450

Cr.

By amount of freight as per charter-party 466,862 ft. at 13.50 & 45,394 ft. at 13.50 minus $\frac{1}{3}$ = $6,729.17 at 4.84 = £1,390 6.5 .....
Less received £875.0.0 = £515.6.5. at 10⅜..... R. 11,920,680

Balance due vessel..... ..... R. 6,770,230

PELA COMPANHIA INDUSTRIAL DO BRAZIL, *Thesoureivo.*

E. & O. E.

(Endorsed:) U. S. circuit court of appeals. William Burrill *et al. vs.* George W. Crossman *et al.* Cross-interrogatories. Black & Kneeland, proctors for libellants, 44 Pine street, New York city.

Cross-interrogatory-.

First. To the first cross-interrogatory he saith, "The bark Kate Burrill arrived at Rio de Janeiro on the 30th day of August, in the year 1893."

Second. To the second cross-interrogatory he saith, "I was one of the directors of the Companhia Industrial do Brazil and was in charge of the office duties."

113 Third. To the third cross-interrogatory he saith, "No, as the vessel had to land her cargo either by lighters or by going alongside the wharf of the saw-mill; and as the latter course was always in benefit of the vessel, as the discharging was done more rapidly, the captain contracted with the owners of the saw-mill, and agrees to go alongside the wharf, and pay him the same amount as if discharged into lighters."

Fourth. To the fourth cross-interrogatory he saith, "The discharging commenced on the 4th of September and was concluded on the 20th of November."

Fifth. To the fifth cross-interrogatory he saith, "I did not state that the Companhia Industrial do Brazil had warehouse room, but that the purchasers had such room, which was situated on the bay of Rio de Janeiro, at Gamboa, where the vessel was alongside."

Sixth. To the sixth cross-interrogatory he saith, "The cargo was not received by the Companhia Industrial do Brazil, but was received by the purchasers, owing to the conditions heretofore described in my direct interrogation. It is perfectly impossible at this late date to give exact date and qualities discharged."

Seventh. To the seventh cross-interrogatory he saith, "As far as I

can recollect, there was no other vessel there at the time the Kate Burrill went alongside."

Eighth. To the eighth cross-interrogatory he saith, "As far as I can recollect no other vessel was alongside while she was there."

114 Ninth. To the ninth cross-interrogatory he saith, "The first payment made to Messrs. Phipps Bros. & Co., as attorneys for the owners, was of the sum of £875. The exact date I cannot recollect, but it was before the vessel had concluded discharging her cargo, and the second payment of Rs. 6,770, $230, being balance due to the vessel in accordance with account presented to Messrs. Phipps Bros. & Co., was on the 7th of December, in accordance with Messrs. P. Bro. & Co.'s receipt."

Tenth. To the tenth cross-interrogatory he saith, "The first payment of Rs. 20,000$ to Messrs. P. Bro. & Co. corresponds to the £875 as stated in the previous answer, and which no doubt was made as stated in the 10th interrogatory, that is, on the 10th of November, 1893, and the second payment of Rs. 6,770 $230 on the 7th of December, 1893. No other payments were made by the Companhia Industrial do Brazil to Messrs. Phipps Bros. & Co. for the carrying of the cargo of the Kate Burrill. The difference of Rs. 5,150 $450 as shown in the account presented, is for disbursements in said accounts, that is lighterage, commission, towage, custom-house duties, etc."

Eleventh. To the eleventh cross-interrogatory he saith, "The receipt is on one of the pages of the vessel's book of vessels consigned to the Companhia Industrial do Brazil. I therefore furnish you with said book with the privilege of making certified copies of same."

Twelfth. To the twelfth cross-interrogatory he saith, "The reply to this is embodied in the interrogatory immediately proceeding, namely, the eleventh."

Thirteenth. To the thirteenth cross-interrogatory he saith,

115 "I have examined the accounts annexed hereto marked 'Exhibit A' and find that they are in strict conformity with the entries in my book."

Fourteenth. To the fourteenth cross-interrogatory he saith, "The Companhia Industrial do Brazil does not exist any more, and I have not received directly or indirectly any communication from Messrs. W. H. Crossman & Brothers with reference to this matter; but I have to state that shortly before this, Mr. J. T. Lewis, United States vice-consul general at Rio de Janeiro, called on me with reference to this matter, and handed said document to me for my perusal, and this is all I have to say in the matter."

EDWIN E. HIME.

Examination taken, reduced to writing and by the witness subscribed and affirmed to this fourteenth day of April, 1893, before

EUGENE SEEGER,
Consul General, Commissioner.

116 B. B. Kate Burrill (Captain Wilson).

To entry at custom-house & captain of port	Rs. 40,000
Conferring manifest & list of stores	40,000
Translation of manifest & copy	22,500
Stamps, and C. H. officer	50,000
Lighterage ac	4,081,400
Towage ac	112,500
Cash to captain	
Commission on inward freight	
2½ on £1,390–6–5 £34–15–2 10⅜	804,050
Ship chandler's ac	
Outward charges	
Clearance at custom-house & captain of port	
Stevedore's ac	
Ballast ac	
	Rs. 75,150,450

Cr.

Freight:

466,862 ft. at $13.50	6,302.63		
47,394 " " 13.50 minus ⅓	426.54		
	$6,729.17 at 4.84		
	£1,390–6–5 Ex.		
Less received	£875–0–0		
	£515–6–5 Ex. 10⅜	11,920	$680
Balance due		6,770	$230

Received balance as above.
Rio de Janeiro, 7th of December, 1893.
(Signed) PHIPPS BROTHERS & CO.

117 At the execution of a commission for the examination of witnesses, wherein

William Burrill and others are libellants against George W. Crossman *et al.*, respondents—

This paper-writing was produced and shown to Edwin Elkin Hime and by him deposed unto at the time of his examination, before

EUGENE SEEGER,
Consul General, Commissioner.

The examination of this commission appears in certain schedules hereunto annexed.

EUGENE SEEGER,
Consul General, Commissioner.

(Endorsed:) U. S. district court, southern dist. of New York. William Burrill *et al.* against George W. Crossman *et al.* Commis-

sion to Rio Janeiro. Wheeler & Cortis, proctors for respondents; office and post-office address, 45 Broadway, New York city, N. Y. United States circuit court of appeals, second circuit. Filed May 17, 1898. William Parkin, clerk.

118 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM BURRILL ET AL.
against
GEORGE W. CROSSMAN ET AL.

Depositions on behalf of libellants, taken by consent at the office of Messrs. Black & Kneeland, No. 45 Pine street, New York city, February 1, 1897.

Present: Mr. Cortis, for the claimant; Mr. Kneeland, for the libellants.

It is stipulated that the depositions may be taken in shorthand, signing, filing and certificate of notary waived, stenographer's fees to be taxed.

THOMAS WILSON, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. KNEELAND:

Q. Where do you reside?
A. Belfast, Ireland.
Q. Your occupation?
A. Sailor.
Q. You are now connected with a line of steamships on the other side?
A. Yes, sir.
Q. Were you in command as master of the bark Kate Burrill on her voyage from Pensacola to Rio in 1893?
A. Yes, sir.
Q. When you left Pensacola you had a cargo of lumber?
A. Yes, sir.

119 Q. Did you have any letter addressed to your consignees at Rio?
A. Yes, sir.
Q. Who were those consignees?
A. Campanhia Industrial do Brazil.
Q. What date did you arrive in Rio?
A. August 30th.
Q. What did you first do there after your arrival?
A. After I got a visit from the doctor, I went ashore and reported myself and ship to the consignees.
Q. Then what was done with your vessel?
A. Towed with a towboat to the measuring ground.
Q. You stayed there how long?

A. Three or four days.
Q. As required by the regulations there?
A. Yes, sir.
Q. When did you report, if at all, to the consignees of the cargo?
A. On the 4th of September.
Q. What did you do on that occasion?
A. Gave them written notice that I was ready to discharge cargo, and to receive the same.
Q. Have you a copy of that notice?
A. No, sir; I have not. I had a copy of it but I haven't it now.
Q. Have you lost it?
A. Yes.
Q. Did you receive any instructions from them at that time?
A. Yes, sir; received instructions to tow into the saw-mill and discharge my cargo.
Q. When did you go to the saw-mill?
A. I don't remember the date now.
Q. Did you proceed right away to the saw-mill, or to where you were ordered?
A. I forget now whether we went in that day or not.
Q. That day or the next day did you go?
A. It was the next day, I think.
Q. Did you go up to the dock?
A. No, within a short distance of it.
Q. What was the trouble?
A. There wasn't enough water to get in to the dock.
Q. When was anything done as to discharging your cargo first?
A. On the 6th.
120 Q. How was the cargo then discharged that was taken off?
A. Into small lighters and taken from the ship on to the wharf.
Q. Was more than one lighter-load taken that day?
A. Just one lighter.
Q. When was the next cargo taken?
A. On the following Saturday. There was two days they didn't send any lighter.
Q. The following Saturday there was some cargo taken off?
A. Yes, one small lighter.
Q. From what part of the vessel was that cargo taken?
A. Deck cargo.
Q. Did they continue to discharge your cargo each day after that for a while?
A. Yes, for a while.
Q. When did you get your deck cargo off?
A. On the 14th.
Q. Then did you get up to the dock?
A. Yes.
Q. Before that had you attempted to get to the dock?
A. Yes, sir; every day we had tried; every time they took a lighter-load off we always tried to get her in.
Q. On the 14th of September you got to the dock?
A. Yes.

Q. What other vessels were there at the time at this dock?
A. There was another Nova Scotia vessel discharging lumber.
Q. She got in there ahead of you?
A. Yes, she was there a fortnight ahead of me.
Q. Did any other vessel come?
A. A Norwegian bark.
Q. Where was this dock?
A. It is on the outskirts of the town, about say two miles.
Q. Above or below the city?
A. Above the city.
Q. Did they continue to discharge each day except Sunday for a while, and if so for how long?
A. Yes, from the 11th till about the 30th of September they continued.
Q. Then was the discharge of the cargo suspended for a while?
A. Yes.

121 Q. At the time you gave the notice on the 4th of September state whether or not you were actually ready and in condition to discharge the cargo?

A. Yes.
Q. Did you keep your crew all the time?
A. Yes, sir.
Q. Did they during this time down to the 30th of September receive the cargo as fast as you were prepared to discharge it?
A. No, sir.
Q. Did you make any objection to the slowness of the discharge of the cargo?
A. Yes.
Q. To whom?
A. The consignees.
Q. What was the answer to your complaint?
A. They told me as soon as that other vessel got out they would take the cargo out as fast as we could discharge her.
Q. Did they, during this period, through September, discharge the cargo as fast as at the rate of 20,000 feet a day?
A. No, sir.
Q. Were you during each and every one of those days ready and able to discharge the cargo faster than the consignees received it?
A. Yes.
Q. After the 30th of September was the discharge of your cargo continued?
A. No, sir.
Q. Why not?
A. They hadn't warehouse-room to put the cargo away from the ship.
Q. They did subsequently discharge cargo from you?
A. Yes, sir.
Q. And at that time what was the condition of the wharf at which the cargo was being discharged?
A. It was pretty well piled up with lumber by the saw-mill.
Q. When the discharge of your cargo was suspended after the

30th of September did you make any complaints to the consignees concerning the same?

A. Yes.

Q. What answer did they make?

A. They said there was no room to put the lumber away on account of the trouble; they couldn't get the lumber clear of the sawmill; they weren't selling their lumber. When the other vessel was there the place was filled up; there was no place to put it.

122 Q. When was the discharge of your cargo completed?

A. On the 28th of November, I think.

Q. Can you without refreshing your recollection at all state in detail the days on which cargo was discharged and received by the consignees?

A. No, not without reference to the log I couldn't name all the days.

Q. Who kept the log?

A. The mate.

Q. Was he a careful man?

A. Yes.

Q. Did you see the entries when they were made, or shortly after they were made?

A. Yes, sir.

Q. Do you know whether the entries as made by the mate in the log are correct or not?

A. Yes, sir.

Q. Is the mate living?

A. No, sir.

Q. When did he die?

A. He died at sea.

Q. On the voyage back?

A. On the voyage home from Rio to St. John.

Q. Can you refer to the log and refreshing your recollection therefrom state the days upon which this vessel discharged cargo and the consignees received the same and the number of pieces which were discharged and received on each day?

A. Yes, sir; by the log book I can.

Q. When did you engage this mate?

A. I engaged him in Rio.

Q. You had discharged your mate?

A. I discharged the mate I had down from Pensacola to Rio.

Q. For drunkenness?

A. Yes, sir.

Q. Is this the log of the vessel I show you?

A. Yes, sir; that is the log.

Q. And the entries made by the mate therein you know to be correct?

A. I know to be correct, yes.

Counsel for libellant offers in evidence the entries in the log from Wednesday, August 30, 1893, to Tuesday, November 28, 1893, and the log is marked Libellants' Exhibit 1 of this date.

123 Q. Did you make any claims upon the consignees of this cargo for demurrage?

A. No, sir; I didn't make any claim.

Q. Did you make any statement to them that you intended to claim demurrage?

A. Yes.

Q. What answer did they make?

A. They said on account of the revolution I couldn't claim any demurrage.

Q. Did you ever see any account rendered by the consignees of the cargo for the amount which they claimed was due for freight and demurrage?

A. No, sir.

Q. You had nothing to do with the collection of the freight?

A. No, sir.

Q. By whom was that collected?

A. Phipps Bros. & Co.

Q. Before leaving port did you note a protest before the British consul?

A. Yes.

Q. Is this your copy of the protest which I show you?

A. It is.

Q. It bears your signature?

A. Yes.

Q. And that protest was noted before the British consul on what date?

A. On the 12th of December.

The protest is offered in evidence and marked Libellants' Exhibit 2 of this date.

Q. Did you know of a revolution being on in Rio while you were there?

A. Yes, I knew it.

Q. When did the revolution or hostilities break out, before or after your arrival?

A. After my arrival.

Q. Before or after you had reported to the consignees and were ordered to this wharf to discharge?

A. It broke out after I gave the notice.

Q. During all the time that you lay at that wharf up to the completion of your discharge on the 28th of November, was there ever any firing in the harbor or any act or hostilities which prevented the discharge by you of the cargo of your vessel or the receipt of the same by the consignees?

A. No, sir.

124 Q. Did any shots come your way at all?

A. No, sir, none.

Q. During all this period you kept your crew?

A. Yes.

Q. Ready to discharge the cargo?

A. Yes, ready to discharge the cargo.

Q. And in case any of your crew were sick state whether or not you hired extra men to take their places?

A. Yes, sir.

Q. About how far from the actual scene of hostilities and the firing on the forts in the harbor of Rio were you lying?

A. From the forts we were lying about five miles.

Q. Were there any war vessels between you and the forts?

A. Yes, sir.

Q. Where was most of the foreign shipping lying?

A. Just outside where I was; just outside at anchor.

Q. They were between you and the firing?

A. Yes, sir; all the foreign men-of-war, English, French and Italian, were all lying outside of the merchant ships.

Cross-examined by Mr. CORTIS:

Q. In whose handwriting are the entries in this log?

A. The chief officer's.

Q. All of them?

A. Yes, sir.

Q. I notice here under date of September 5th:

"Hove up anchor and hauled to saw-mill. Had a h—— of a t—— with Murphy, both mates drunk."

Q. Whose handwriting is that in?

A. That is the mate.

By Mr. KNEELAND:

Q. Which mate?

A. The mate I had from Pensacola down to Rio.

125 By Mr. CORTIS:

Q. Is he one of the mates he refers to when he says "both mates drunk"?

A. Yes. The chief mate and the second mate.

Q. Did one of the drunken men make that entry?

A. Yes.

Q. He was referring to himself, then, was he?

A. He was referring to himself and the second mate.

Q. Did you discharge him after that?

A. Yes, sir.

Q. How soon after?

A. On the following Sunday he left the ship.

Q. Did you hire a new mate at once?

A. Yes, sir.

Q. Have any trouble with him?

A. No, sir.

Q. Did you report from day to day to Phipps & Co. about the progress that was being made in the discharge of the cargo?

A. No, sir.

Q. They were your agents, weren't they?

A. Yes.

Q. You gave them no information as to how the ship was discharging, did you?

A. Yes, sir; sometimes.

Q. Did you say anything to them about claiming demurrage from the consignees?

A. Yes, sir.

Q. Did you ask them to claim demurrage?

A. No, sir.

Q. What did you say about demurrage to them?

A. I said that the ship ought to get demurrage for detaining her so long in port after her lay days were up.

Q. Who did you say that to?

A. The manager in Phipps' office.

Q. What did he say to you in reply?

A. He didn't say anything.

Q. Did you furnish him any figures as to demurrage?

A. No, sir.

Q. Did you make any demand on the consignees for demurrage?

A. No, sir.

Q. Did anybody that you know of down there?

A. No, sir.

126 Q. Then why did you make this entry in the protest:

"Demurrage is claimed to the amount of $3,158.38 as per charter-party, which the consignees refuse to pay."

A. I told them they would have to pay demurrage and they said they couldn't do it on account of the revolution.

Q. Whom did you tell that?

A. The consignees.

Q. Then why do you say that you never asked them for demurrage? You said a moment ago that you never demanded demurrage from the consignees; did you or didn't you?

A. Yes, as soon as our lay days were up I went to the consignees and told them they would have to pay demurrage and they said we couldn't claim any demurrage on account of the revolution.

Q. At the end of the discharge did you make any claim for demurrage from the consignees?

A. That is the time I went to them.

Q. You said at the end of the lay days?

A. When the lay days were up.

Q. When the ship was entirely discharged did you go again and claim demurrage?

A. No, sir.

Q. Did you tell them at any time that there was $3,158.38 demurrage bill?

A. I don't recall whether I told them about that or not.

Q. Did you say anything to them about the amount of demurrage?

A. I couldn't say, I am sure; I can't recollect; it is a long time ago, you know; three years.

Q. Did you furnish any information at all to Phipps & Co. to enable them to send their account to the consignees of the cargo?

A. No, sir.
Q. How was the cargo discharged from the ship?
A. Discharged out of the bow ports on to the wharf.
Q. Who discharged it?
A. The crew of the ship.
Q. The consignees' men took it from the ship?
A. Yes, took it from the bows of the ship.

Q. The consignees' men stood on the wharf and your men
127 stood on the ship; and is that the way it was done?

A. Yes, they had a stage from the bow of the ship on to the wharf. My men shoved it up through the bow ports of the ship and the consignees' men received it from the bow of the ship.
Q. Was this the first time that you have ever been on demurrage?
A. Yes, sir.
Q. Didn't you know that your charter-party called for demurrage so much a day, day by day?
A. Yes, sir.
Q. Why didn't you make your demand each day for your demurrage?
A. I didn't think it was any use on account of what they said when I told them about the demurrage.

Redirect examination by Mr. KNEELAND:

Q. You say you did call on them when the lay days were up?
A. Yes, I went right up there.
Q. And they told you then that they did not intend to pay any demurrage?
A. Yes, on account of the revolution I was not entitled to it.
Q. Did you from time to time call at the office?
A. Yes.
Q. And make any claim for demurrage?
A. Just the same story all the time, every time I went up.
Q. You reported to Phipps Bros. when the discharge of your cargo was completed, did you not?
A. Yes, sir.
Q. Did you ever have any conversation with the manager or anybody connected with Phipps Bros. about the detention of this vessel?
A. Yes, I had a short conversation with them.
Q. What did you say?
A. I said the consignees ought to pay the demurrage for detaining the vessel so long.
Q. What did they say?
A. They said they didn't know.

128 WILLIAM BURRILL, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. KNEELAND:

Q. You are one of the libellants herein?
A. Yes.
Q. Who were the owners of the bark Kate Burrill at the time mentioned in the pleadings?
A. Myself, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson and John R. Blauvelt; I think that covers all the owners.
Q. All residing at Nova Scotia?
A. Yes, all reside in Yarmouth county, Nova Scotia.
Q. Who collected the freight of the vessel on this voyage at Rio?
A. I presume Phipps Bros. & Co. collected the freight.
Q. They remitted it to you?
A. Yes.
Q. In remitting that freight to you did they also send you a copy of the statement rendered by the consignees, the Companhia Industrial do Brazil?
A. Yes.
Q. Will you look at the paper I show you and state whether that is the paper that was sent to you by Phipps Bros. & Co.?
A. Yes, sir.

The paper is offered in evidence.

By Mr. CORTIS:

Q. This was a copy of the account they rendered to the company?
A. This was rendered for us to our agents, and they sent it to us.
Q. That was rendered by the company to Phipps Bros.?
A. Yes.

The paper is marked Libellants' Exhibit 3 of this date.

By Mr. KNEELAND:

Q. Look at the paper which I show you and state whether that is the account of Phipps Bros. & Co. with yourself, which was
129 accompanied by this statement, Libellants' Exhibit 3?
A. Yes.

The paper is offered in evidence.
Objected to as irrelevant and immaterial.
It is marked Libellants' Exhibit 4 for identification of this date.

Q. Previous to your receipt of Libellants' Exhibit 3 had you received from Phipps Bros. & Co. a remittance on account of the freight?
A. Yes.

Mr. CORTIS: I object to all this line of testimony.

Q. Did you ever receive from Phipps Bros. & Co. any remittance on account of demurrage?

Objected to.

A. No; those are the only two documents we ever received.

Q. Did you ever receive from them any account showing the sums received by them for freight, or otherwise, than the paper which is marked Libellants' Exhibit 4 for identification?

A. Those are the only papers we ever had from Phipps Bros. & Co., those two; and the vouchers in connection with them.

Cross-examined by Mr. CORTIS:

Q. Did you or any of your associates give your captain any instructions as to demurrage before he sailed?

A. No.

Q. Did you give Phipps Bros. any instructions as to claiming demurrage?

A. I wrote Phipps Bros. & Co. after seeing there was a revolution at Rio, that if the vessel was detained they should claim demurrage. But at that time I wasn't aware that the bill of lading didn't refer to the charter-party. If I had known that of course I would have known too much to ask them to collect demurrage.

130 Q. Did you get any reply to that letter?

A. The bill of lading in this case wasn't a customary one.

Q. Did you get any reply to that letter to Phipps Bros.?

A. I got a reply, yes.

Q. What did they say?

A. That would be about the time the ship was sailing, and I forget just what they said. I think they referred to hostilities being on there.

Q. Have you that reply?

A. I haven't it here.

Q. Can you produce it?

A. I think I can.

Mr. Cortis calls for the production of that letter.

Q. Can you state the substance of it from your recollection?

A. No, I cannot.

Q. Did they say they had or that they had not demanded demurrage?

A. They never demanded demurrage. It was in reply to my letter. I think I said I might have a claim against the Brazilian government on account of the charter-party not referring to hostilities. I have got a copy of my letter to them.

Q. Will you send to Mr. Kneeland a copy of that letter and also their reply?

A. Yes, if I can find them.

LIBELLANTS' EXHIBIT 1, LOG BOOK.

Laying at Rio de Janeiro.

Wednesday, Aug. 30, 1893.

Wind light N. E., raining. Started to unbend sails. At 11 a. m. hove up anchor and towed to measuring ground. Came to at 1 o'clock in 8 fathom of water. 30 fathom to hawse pipe. Cunningham night watch. At dark thick and rainy. Pumps and riding light attended to.

131 Thursday, Aug. 31.

Wind light. E'ly. Unbent sails and put away. Middle and later part light wind N. E. and cloudy. Pumps and riding light attended to.

Friday, Sept. 1st.

Wind light S. E. and clear. Employed in scrubbing ship outside. Pumps and riding light attended to.

Saturday, Sept. 2d.

Wind light e'ly and clear. Scrubbing ship 10 a. m. Hove up 15 fathoms chain to go to wharf, didn't go all the same. D. H. Pumps and lights attended to.

Sunday, Sept. 3d.

Wind moderate N. E. and cloudy. Being Sunday no work. Pumps, riding light and watchman attended to.

Monday, Sept. 4th.

Wind light N. E. Variously employed.

Tuesday, Sept. 5th.

Hove up anchor and hauled to saw-mill. Had a H. of a T. with Murphy. Both mates drunk.

Wednesday, Sept. 6th.

Put out 150 deals. Getting sober. Cloudy and rainy.

Thursday, Sept. 7th.

Wind N. E. Cloudy and rainy, Crew employed scrubbing out cabin and forecastle. Day end same.

Friday, Sept. 8, 1893.

Wind light S. E. Crew employed scraping yards, latter part of day cloudy and misty. Pumps attended to.

132 Saturday, Sept. 9th.

Wind S. W. light. Cloudy and misty, discharged 155 deals. Pumps attended to.

Sunday, 10th Sept., '93.

Light airs and sultry weather. Vessel still lying off the saw-mills. Pumps and riding light strictly attended to. Cunningham watchman.

Monday, 11th Sept., '93.

Light airs. Hot and sultry weather. Discharged 105 deals (of deck-load). Ship still lying off the saw-mills. Pumps and light strictly attended to. Joined ship this day. Crew engaged discharging cargo part of day, the remainder of day employed in filling water, and trying to heave the vessel into berth. Cunningham watchman.

J. PAGE, *Mate.*

Tuesday, 12th Sept., '93.

Light airs and fine weather throughout the day; discharged 105 deals (off the deck-load). Crew employed the remainder of the day in scraping yards and trying to heave ship into berth. Pumps and light strictly attended to. Cunningham watchman.

Wednesday, 13th Sept., '93.

Mod. breeze and fine and clear weather. Discharged 115 deals, (60 of the deck-load) and the remaining 55 out of (the hallyways at poop, making in all 739 deals (all the deck-load). Pumps and light strictly attended to. Crew employed in discharging cargo and heaving vessel into berth at saw-mills. Was successful this evening and moved alongside wharf. Cunningham watchman.

Friday, 15th Sept., '93.

Hot, sultry weather, discharged 142 deals. Pumps strictly attended to. Cunningham watchman.

133 Saturday, 16th Sept., '93.

Fresh breeze and showery throughout the day. Discharged 173 deals. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 17th Sept., '93.

Hot and sultry weather and no wind. No cargo worked today, it being the Sabbath. Pumps strictly attended to. Cunningham watchman.

Monday, 18th Sept., '93.

Mod. breeze and showery throughout the day, discharged 265 deals. Pumps strictly attended to. Cunningham watchman.

Tuesday, 19th Sept., '93.

Light airs and showery in the morning. Cleared up towards evening. Discharged 262 deals. Pumps strictly attended to. Cunningham watchman.

Wednesday, 20th Sept., '93.

Fine weather throughout the day. Discharged 117 deals. Pumps strictly attended to. Cunningham watchman.

Thursday, 21st Sept., '93.

Mod. breeze and showery throughout the day, discharged 160 deals. Pumps strictly attended to. Cunningham watchman.

Friday, 22d Sept., '93.

Light breeze and fine and dry weather. Discharged 239 deals. Pumps strictly attended to. Cunningham watchman.

134 Sat., 23d Sept., '93.

Hot and sultry weather throughout the day, discharged 226 deals. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 24th Sept., '93.

Hot and sultry weather throughout the day. No cargo worked. Pumps strictly attended to. Cunningham watchman.

Monday, 25th Sept., '93.

Fresh breeze and showery throughout the day. Discharged 127 deals. Pumps and light strictly attended to. Cunningham watchman.

Tuesday, 26th Sept., '93.

Fresh breeze and much rain the first part of day, and moderated towards evening. Discharged 380 deals. Pumps strictly attended to. Cunningham watchman.

Wednesday, 27th Sept., '93.

Hot and sultry weather, discharged 257 deals. Pumps strictly attended to. Cunningham watchman.

Thursday, 28th Sept., '93.

Weather still hot and sultry with light airs of wind, discharged 345 deals. Pumps strictly attended to. Cunningham watchman.

Friday, 29th Sept., '93.

Mod. breeze and heavy rain. Discharged 499 deals. Pumps strictly attended to. Cunningham watchman.

135 Saturday, 30th Sept., '93.

Showery throughout the day, wind very light, discharged 360 deals. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 1st October, '93.

Light air and wind and showery throughout the day. Pumps strictly attended to. Cunningham watchman.

Monday, 2d October, '93.

Strong breeze and showery. Hands employed scraping yards and passing water from the shore. Pumps strictly attended to. Cunningham watchman.

Tuesday, 3d October, '93.

Mod. breeze and fine weather throughout the day. Hands employed in scraping yards. Pumps strictly attended to. Cunningham watchman.

Wednesday, 4th October, '93.

Hot and sultry the first part of day with wind and rain during the latter part. Hands employed in scraping yards. Pumps strictly attended to. Cunningham, watchman.

Thursday, 5th October, '93.

Heavy squalls of wind and rain throughout the day. Moderated at midnight. Hands employed at oiling yards, &c. Pumps strictly attended to. Cunningham, watchman.

Friday, 6th October, '93.

Light winds and showery. Hands variously employed. Pumps strictly attended to. Cunningham watchman.

136 Sat., 7th Oct.

Strong breeze and heavy rain all day. Hands employed in passing water from shore. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 8th Oct., '93.

Showery all day and much lightning towards midnight. Pumps strictly attended to. Cunningham watchman.

Monday, 9th Oct., '93.

Mod. breeze throughout the day and showery towards evening. Darcy, A. B. went this day to hospital, he having been drunk on Sunday and fighting. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

Tuesday, 10th Oct., '93.

Hot and sultry all day. Crew variously employed. Pumps carefully attended to. Cunningham watchman.

Wed., 11th Oct., '93.

Heavy rain all day. Crew employed in passing water, &c. Pumps strictly attended to. Cunningham watchman.

Thur., 12th Oct., '93.

Strong winds and showery. Crew employed chipping chain plates. Pumps carefully attended to. Cunningham watchman.

Frid., 13th Oct., '93.

Mod. breeze and fine weather throughout the day. Hands chipping chain plates and all the chain-work forward. Pumps strictly attended to. Cunningham watchman.

137 Sat., 14th Oct., '93.

Light airs and hot and sultry weather. Crew employed in chipping iron. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 15th Oct., '93.

Hot and sultry all day, light breeze towards evening. Pumps strictly attended to. Cunningham, master.

Monday, 16th Oct., '93.

Strong breeze and showery throughout the day, discharged 434 deals. Pumps strictly attended to. Cunningham watchman.

Tuesday, 17th Oct., '93.

Mod. breeze and fine weather throughout the day, discharged 163 deals, pumps strictly attended to. Cunningham watchman.

Wed., 18th Oct., '93.

Light airs, hot and sultry weather throughout the day, pumps strictly attended to. Cunningham watchman. Crew employed chipping chain gear forward.

Thur., 19th Oct., '93.

Mod. breeze and showery. Crew employed chipping and passing water from the shore, pumps strictly attended to. Cunningham watchman.

Frid., 20th Oct., '93.

Hot and sultry weather throughout the day. Crew employed in painting chain plates and chain gear forra-d. Pumps strictly attended to. Cunningham, watchman.

138 Sat., 21st Oct., '93.

Hot and sultry weather throughout the day. Crew employed in painting ship outside. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 22d Oct., '93.

Mod. breeze and cloudy weather, much rain towards midnight, pumps strictly attended to. Cunningham watchman.

Mon., 23d Oct., '93.

Strong breeze and showery throughout the day, discharged 136 deals, pumps strictly attended to. Cunningham watchman.

Tues., 24th Oct., '93.

Light breeze and fine weather. Crew employed in painting ship outside. Pumps strictly attended to. Cunningham watchman.

Wed., 25th Oct., '93.

Mod. and fine throughout the day, discharged 413 deals, pumps strictly attended to. Cunningham watchman.

Thur., 26th Oct., '93.

Light breeze and hot and sultry weather. Crew employed in passing water from shore and scrubbing ship's side. Pumps strictly attended to. Cunningham watchman.

Frid., 27th Oct., '93.

Mod. breeze and fine weather throughout the day, discharged 356 deals, pumps strictly attended to. Cunningham watchman.

139 Sat., 28th Oct., '93.

Strong breeze and showery. Crew employed in chipping iron knees in b-tween-decks, pumps strictly attended to. Cunningham watchman. Murphy, A. B. sick this day after effects of drink, he having fallen into water the previous evening while drunk.

J. PAGE, *Mate.*

Sunday, 29th Oct., '93.

Hot and sultry weather throughout the day, pumps strictly attended to. Cunningham watchman. Murphy still laid up.

Monday, 30th Oct., '93.

Mod. breeze and showery. Crew employed chipping iron knees, &c., in 'tween-decks. Murphy, A. B. sick today again. Pumps strictly attended to. Cunningham watchman.

Tuesday, 31st Oct., '93.

Light breeze. Hot and sultry weather. Crew employed in chipping in lower hold. Murphy laid up. Pumps strictly attended to. Cunningham watchman.

Wed., 1st November, '93.

Strong winds with rain. Crew employed in chipping iron knees in lower hold. Murphy laid up. Pumps strictly attended to. Cunningham watchman.

Thur., 2nd November, '93.

Fresh breeze and dry weather throughout the day. Crew employed in lower hold chipping iron knees, &c. Pumps strictly attended to. Cunningham watchman. Murphy laid up.

Frid., 3rd Nov., '93.

Hot and sultry weather and a dead calm. Crew employed in chipping and painting knees in the hold. Murphy laid up, pumps strictly attended to. Cunningham watchman.

140 Saturday, 4th Nov., 93.

Showery and squally all day. Crew employed in painting and chipping iron-work about deck. Pumps carefully attended to. Murphy laid up. Cunningham watchman.

J. PAGE, *Mate.*

Sunday, 5th Nov., '93.

Light airs and hot and sultry weather throughout the day. Pumps strictly attended to. Cunningham watchman. Murphy laid up.

Monday, 6th Nov., '93.

Fresh breeze and fine weather, discharged 538 deals, pumps strictly attended to. Murphy A. B. to hospital today. Cunningham watchman.

Tues., 7th Nov., '93.

Light breeze and fine weather. Crew variously employed, pumps strictly attended to. Cunningham watchman.

Wed., 8th Nov., '93.

Light breeze and fine weather. Crew employed in painting iron knees in hold and passing water from shore. Pumps strictly attended to. Cunningham watchman.

Thur., 9th Nov., '93.

Mod. breeze and showery weather. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

Frid., 10th Nov., '93.

Light breeze and fine weather throughout the day. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

141 Sat., 11th Nov., '93.

Light breeze and fine weather. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

J. PAGE, *Mate.*

Sun., 12th Nov., '93.

Mod. breeze and clear weather, pumps strictly attended to. Cunningham watchman.

Mon., 13th Nov., '93.

Light air and hot sultry weather. Crew variously employed, pumps strictly attended to. Cunningham watchman.

Tues., 14th Nov., '93.

Mod. breeze and showery throughout the day. Crew variously employed. Pumps strictly attended to. Cunningham watchman.

Wed., 15th Nov., '93.

Fresh breeze and showery throughout the day. Crew variously employed, pumps strictly attended to. Cunningham watchman.

Thur., 16th Nov., '93.

Light airs and sultry weather, discharged 296 deals, pumps strictly attended to. Cunningham watchman.

Frid., 17th Nov., '93.

Mod. breeze and fine and clear weather throughout the day. Discharged 621 deals, pumps strictly attended to. Cunningham watchman.

142 Sat., 18th Nov., '93.

Light breeze and showery throughout the day. Crew employed chipping iron about the main deck and beating rust of top sail sheets. Pumps strictly attended to. Cunningham watchman. Murphy A. B. came back from hospital today.

J. PAGE, *Mate.*

Sunday, 19th Nov., '93.

Light airs and sultry weather, pumps strictly attended to. Cunningham watchman.

Monday, 20th Nov., '93.

Light breeze and fine and clear weather, discharged 451 deals today. Pumps strictly attended to. Cunningham watchman.

Tues., 21st Nov.

Light breeze and cloudy weather. Crew employed in reeving aft running gear and clearing up hold for ballast, &c.. pumps strictly attended to. 4.50 p. m. One boat with 35 tons ballast, discharged part. Cunningham watchman.

Wed., 22nd Nov., '93.

Mod. breeze and warm weather, finished discharging ballast lighter at noon, pumps strictly attended to. Hands after discharging lighter variously employed. Cunningham watchman.

Thur., 23d Nov., '93.

Mod. breeze and cloudy weather. Crew variously employed painting the brown on ship's side. Caulking ports, &c. Pumps carefully attended to. Cunningham watchman.

143 Fri., 24th Nov., '93.

Light breeze and showery throughout the day. Crew variously employed, discharged 337 deals, pumps carefully attended to. Cunningham watchman.

J. PAGE, *Mate.*

Saturday, 25th Nov., '93.

Mod. breeze and fine weather, discharged on lighter of 25 tons ballast. Crew variously employed. Pumps carefully attended to. Cunningham watchman.

Sunday, 26th Nov., '93.

Light breeze and fine and clear weather, pumps strictly attended to. Cunningham watchman.

Mon., 27th Nov., '93.

Mod. breeze and fine and clear weather. Crew variously employed, pumps strictly attended to. Cunningham master.

Tues., 28th Nov., '93.

Light breeze and cloudy weather, discharged 435 deals which finishes cargo. Pumps carefully attended to. Cunningham watchman.

144 LIBELLANTS' EXHIBIT 2. Feb. 1, '97.

(Copy.)

Know all men by these presents that on this twelfth day of December 1893 before me W. G. Abbott Esq're H. B. M. consul general for this city and State of Rio de Janeiro personally came and appeared Thomas Wilson master of the British barque "Kate Burrill" of Yarmouth N. S. official No. 61817 who solemnly declared and stated as follows viz

That his vessel the "Kate Burrill" arrived in Rio de Janeiro from Pensacola on the 30th of August 1893 with a cargo of lumber consigned to the Companhia Industrial do Brazil that due written notice was handed to said consignees on the 4th of September 1893 that said vessel was ready to commence her discharge and that her lay days would commence on that day leaving 27 days for discharging which expired on the 6th of October.

That owing to the detention of the consignees the cargo was not all discharged until the 28th of November, 1893, thus delaying the vessel 53 fifty-three days beyond the lay days and for which demurrage is claimed to the amount of $3,158.38 as per charter-party which the consignees refuse to pay therefore the appearers has noted this protest which he has signed at the place and dated aforesaid.

THOS. WILSON, *Master.*

(Signed) W. G. ABBOTT,
H. B. M. Consul General.

In testimonium veritatis, British consulate. Rio de Janeiro, December 12, 1893.

JAMES PARK,
Acting Vice-Consul.

(Stamps.)

145 LIBELLANTS' EXHIBIT 3. Feb. 1, '97.

Companhia Uniao Mercantil, successora de Monteiro, Hime & C., Miranda, Guimaraes & C., Marinho, Reis & C., 32 Rua Theophilo Ottoni 32 Rio de Janeiro Caixa N. 593.

RIO DE JANEIRO, *November*, 1893.

The B. B. "Kate Burrill," 691 tons, Captain Wilson, in account with the Comp^a Industrial do Brazil, consignee.

To entry at custom-house & captain of the port.....	R. 40$000
" conferring manifest & list of stores...	40 000
" translation of manifest & copy.....	22 500
" stamps.....	50 000
" lighterage ac.....	4,081 400
" towage ac.....	112 500
" cash to captain.....	
" commission on inward freight, 2½ % on £1,390.6.5 = £34.15.2 at 10⅜...	804 050
" commission on outward freight.....	
" ship chandler's ac.....	
" outward charges.....	
" clearance at custom-house & captain of the port..	
" stevedore's ac.....	
" ballast ac.....	
	R. 5,150$450

CR.

By amount of freight as per charter-party 466,862 ft. at 13.50 & 47,394 ft. at 13.50 minus ⅛ = $6,729.17 at 4.84 = £1,390 6.5.....	
Less received £875.0.0 £515.6.5 at 10⅜.....	R. 11,920$680
Balance due vessel.....	Rs. 6,770$230

PELA COMPANHIA INDUSTRIAL
DO BRAZIL, *Thesoureiso.*

E. & O. E.

EDWIN E. HIME.

DR. Messrs. Wm. Burrill & Co'y in account with Phipps Bros. & Co'y. CR.

1893.					
Oct'b'r 9	To telegrams to Yarmouth.....	21,120	Nov'b'r 10	By cash received from Cia Industrial do Brazil ac. freight per "Kate Burrill" £875 0 0 at 10½d.....	20,000,000
Nov'b'r 16	To our remittance £875 0 0 at 10½d.....	20,000,000			
Dec'b'r 13	To disbursement of "Kate Burrill" as per list.....	7,137,520	Dec'b'r 7	By cash received from Cia Industrial do Brazil, balance of freight as per their statement.....	6,770,230
" "	To commission collecting freight R. 26,770-$230 at 1%.....	267,700			673,710
" 18	To telegram to Yarmouth.....	17,600	" 18	By balance.....	
		R. 27,443,940			R. 27,443,940
Dec'b'r 18	To balance £29 2 6 at 10¾d.....	673,710			

E. & O. E.
Rio de Janeiro, 18th December, 1893.

PHIPPS BROTHERS & CO.

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147 (Copy.)

11TH OCT., 1893.

Messrs. Phipps Bros. & Co., merchant-, Rio Janeiro.

GENTLEMEN: We cabled you on 4th inst. "Kate Barbadoes Violate" on 9th inst. rec'd your reply "probably thirty days." On receipt this if you have not done so previously please cable date she sailed for Barbadoes. We also rec'd your letters of 5th Aug. and 2nd Sept. We presume the delay and extra cost of provisions and labor &c. will be a very serious additional expense for which the government of Brazil should be liable, in which case we hope you will claim for us the utmost dollar. We note by the C. party that there is no exception clause covering these occurrences and it's just possible the consignees' cargo are liable.

Yours truly, WM. BURRILL & CO.

Per "Lassell" S. S.

PHIPPS BROTHERS & Co.,
RIO DE JANEIRO, 17*th November*, 1893.

Messrs. Wm. Burrill & Co., Yarmouth, Nova Scotia.

GENTLEMEN: Since writing on 16th ulto. we are in receipt of your favor of 11th *idem*.

There is absolutely no claim against the government that could be made good for loss occasioned by delays &c., in consequence of the present revolutionary troubles, and every branch of trade is suffering severely without any prospect of redress.

148 We saw Captain Wilson a day or two ago when he told us he had still about 2,000 pcs. on board and waiting for his consignees to take them away. It is we understand most difficult to get labour and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times but have told him that he should look to his consignees to make the claim on the owners of the cargo. It is not at all unlikely that there will be still further delay in ballasting the vessel, as the revolutionary operations on the bay prevent ships from using the usual ballasting grounds.

We have received from the consignees a payment on account of freight which we are remitting in a draft enclosed at 120d. date for £875–0–0 on the London & River Plate Bank Ltd.; the 2nd and 3rd will follow in due course.

We will advise you by cable when the "Kate Burrill" sails.

We remain, gentlemen, very faithfully,

PHIPPS BROTHERS & CO.

(Endorsed:) William Burrill *et al. vs.* George W. Crossman *et al.* February 1, 1897. Depositions for libellants. Service of copy admitted Feb'y 19, 1897. Wheeler & Cortis, proc's for resp't-.

149 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Submitted November 9, 1898; decided December 7, 1898.

WILLIAM BURRILL ET AL., Libellants, Appellants,
vs.
GEORGE W. CROSSMAN and HERMAN SIELCKEN, Claimants, Appellees. } No. 1.

Appeal from the district court of the United States for the southern district of New York.

Before Judges Wallace and Lacombe.

WALLACE, *Circuit Judge:*

Most of the questions arising upon this appeal have been disposed of by this court upon a former occasion, and it remains to be considered whether the defenses of payment and accord and satisfaction are sustained by the proofs. In considering these defenses we shall treat the case as though Phipps Bros. & Co., the agents of the appellants at Rio Janeiro, had authority coextensive with that of the appellants themselves to make any settlement or compromise with the consignees of the cargo in respect of freight and demurrage which might seem desirable; and as though the consignees, as agents for the appellees, had complete authority in their behalf to settle with Phipps Bros. & Co. for all items arising under the charter, including demurrage as well as freight. The appellees were liable to the appellants for a balance of freight due under the charter, and, as we have previously held, were also liable for demurrage for the detention of the vessel at Rio Janeiro. After the cargo had been discharged, the consignees rendered to Phipps Bros. & Co. an
150 account with the vessel, crediting her with the amount of "freight as per charter," and charging her with advances, payments, etc., and stating a balance due from them. That balance was paid, and Phipps Bros. & Co. receipted in full. The latter had made no claim against the consignees for the demurrage, although they had been instructed so to do by the appellants. They seem to have been under the impression that because the detention of the vessel had not been caused by the consignees, but by the acts of the revolutionists, the Brazilian government alone was responsible. The master of the vessel had told the consignees that they would have to pay demurrage, and they insisted that there was no liability. The master, however, had no authority to collect demurrage, and the consignees had been instructed not to settle the accounts with the master but to settle them with Phipps Bros. & Co.

Part payment of an unliquidated demand is not a discharge of the whole, unless accepted upon an agreement or understanding to that effect. The giving of a receipt in full, while evidence of such an agreement, is not conclusive. See Grinnell *vs.* Spink (128 Mass., 25). In the present case the receipt only purported to be in full of

the freight, and "cannot by any ingenuity be made to reach other claims." Harden *vs.* Gordon (2 Mass., 562).

An agreement to accept part of an unliquidated and disputed demand in full satisfaction of the whole demand, executed by the payment of a sum agreed upon, is of course a good accord and satisfaction. In this case there was no such agreement; nor was any disputed demand the subject of negotiation between the agents of the respective parties. Although the appellants had instructed Phipps Bros. & Co. to make a claim for demurrage, the latter, acting upon a misapprehension of the validity of the claim, did not do so; and the case stands as though the appellants had contemplated urging but had never urged it. Neither Phipps Bros. & Co., nor the consignees, supposed that a claim for demurrage was included in the demand which was adjusted. It is insisted for the ap-
151 pellees that the rendition and payment of the account by the consignees and the acceptance of the amount by the appellants has the effect of a stated and settled account between parties. The consignees doubtless supposed when they rendered their account with the vessel, and paid it, that they were paying all demands arising under the charter; and so did Phipps Bros. & Co. Nevertheless, it was the right of the latter, upon the discovery that they had a further valid demand against the consignees, within a reasonable time to insist upon opening the account. An account stated is a mere admission that the account is correct. If the party to whom it is rendered omits to communicate objections to the party rendering it within a reasonable time an inference may be drawn that he was satisfied with it; but there is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account thus rendered. An account settled is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never precluded from giving evidence that the account did not include all the demands between them unless the case is brought within the principles of an estoppel *in pais*, or of an obligatory agreement between the parties; as for instance where mutual compromises are made. Lockwood *vs.* Thorn (18 N. Y., 285); Stenton *vs.* Jerome (54 N. Y., 484). A stated and settled account is only *prima facie* evidence of its correctness. "It may be impeached by proof of unfairness, or mistake in law or in fact; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it." Parkins *vs.* Hart (11 Wheat., 237).

As a matter of fact the consignees were not agents for the appellees; they were the purchasers of the cargo. The appellees had chartered the vessel for the voyage from the appellants, and by the terms of the charter-party the master was to sign "bills of lading as presented," and the vessel was to have a lien upon the cargo for the freight. By the terms of the bill of lading presented by the
152 appellees, signed by the master and transferred to the consignees, the cargo was to be delivered to the latter upon the payment of the "freight as per charter-party;" and the consignees were entitled to the cargo upon such payment without liability for

demurrage save such as might be occasioned by their own neglect. The detention at Rio Janeiro for which the demurrage became due under the terms of the charter was not occasioned by the consignees, but by *vis major;* and the consignees were not, but the appellees by the terms of the charter were, liable for demurrage. In rendering the account and paying the freight the consignees were simply rendering and paying their own account, and the appellees can take nothing by their act save as it effected, what it purported, a payment of the freight.

The question whether there was a valid claim against the appellees for demurrage, was under the peculiar facts of the case a doubtful one. They were not personally at fault, but by the strict terms of the contract became liable for a contingency which was outside the contemplation of either party when the contract was made. Under the circumstances justice will be satisfied by decreeing the payment of the principal without interest. The proofs show a detention of the vessel contrary to the terms of the charter of fifty-three days, entitling the appellants to demurrage in the sum of $3,151.

The decree of the court below is reversed with instructions to decree accordingly with costs.

Lawrence Kneeland, for the appellants.

Everett P. Wheeler, for the appellees.

153 At a stated term of the United States circuit court of appeals for the second circuit held at the court-rooms, in the Federal building, in the borough of Manhattan, city of New York, on the 20th day of December, 1898.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

WILLIAM BURRILL ET AL., Libellants & Appellants,
vs.
GEORGE W. CROSSMAN ET AL., Respondents & Appellees.

This cause having come on to be heard on the appeal of the libellants from a final decree of the district court of the United States for the southern district of New York, entered January 16, 1895, and the pleadings having been amended and further testimony having been taken in this court on said appeal, and the cause having been argued and submitted and due deliberation having been had, now, on motion of Black & Kneeland, proctors for the libellants and appellants, it is—

Ordered, adjudged, and decreed that the said decree of said district court be, and the same is hereby, reversed with costs, and that a mandate issue from this court to said district court directing that it decree in favor of the libellants for the sum of thirty-one hundred and fifty-one dollars, with costs.

W. J. W.
E. H. L.

Endorsed: U. S. circuit court of appeals, second circuit. William Burrill *et al. vs.* George W. Crossman *et al.* Order and notice.

Black & Kneeland, proctors for lib'l't-, 44 Pine St., New York city. Due service of a copy of the within order and notice is hereby admitted. Dated Dec. 12, 1898. Wheeler & Cortis, proctors for Crossman. United States circuit court of appeals, second circuit. Filed Dec. 20, 1898. William Parkin, clerk.

154 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages numbered from 1 to 153, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William Burrill *et al.*, libellants, appellants, against George W. Crossman *et al.*, respondents, appellees, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 9th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

WM. PARKIN, *Clerk.*

[Ten-cent internal-revenue stamp, canceled 1, 9, '99, W. P.]

155 U. S. Circuit Court of Appeals.

WILLIAM BURRILL ET AL.
against
WILLIAM H. CROSSMAN ET AL.

It is stipulated and agreed that the certified copy of the transcript of record on file in the Supreme Court, at Washington, be taken as a return to the writ of certiorari.

New York, January 25, 1899.

WHEELER & CORTIS,
Proctors for Wm. Crossman et al.
BLACK & KNEELAND,
Proctors for William Burrill et al.

A true copy.

WM. PARKIN, *Clerk.*

156 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant- said stipulation is certified as a return to this writ.

Dated New York, January 25th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 1, 26, '99. W. P.]

157 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson, and John R. Blauvelt, owners of the bark "Kate Burrill," are appellants and George W. Crossman and Herman Sielcken are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
158 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and pro-

ceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

159 [Endorsed:] No. 17,260. Supreme Court of the United States. No. 187, October term, 1899. George W. Crossman & Herman Sielcken *vs.* William Burrill *et al.* Writ of certiorari & return. Filed Feb'y 1, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN, PETITIONERS,

against

WILLIAM BURRILL, JAMES BURRILL, AND OTHERS, OWNERS OF THE BARK "KATE BURRILL," RESPONDENTS.

And now come George W. Crossman and Herman Sielcken, by their proctor, Everett P. Wheeler, and move this honorable court that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the second circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said cause therein entitled "William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson, and John R. Blauvelt, owners of the bark 'Kate Burrill,' libelants, against George W. Crossman and Herman Sielcken, respondents," to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define

and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

EVERETT P. WHEELER,
Proctor for Petitioners.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1898.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, *Petitioners*,
against
WILLIAM BURRILL, JAMES BURRILL, and OTHERS, *Owners of the Bark "Kate Burrill," Respondents.*

To the Supreme Court of the United States:

The petition of George W. Crossman and Herman Sielcken respectfully showeth:

First. Your petitioners are engaged in business in the city of New York, and are the respondents in the cause heretofore pending in the circuit court of appeals for the second circuit, hereinafter mentioned.

Second. The decree, to review which a writ of certiorari is asked, was rendered by the circuit court of appeals for the second circuit on the 20th day of December, 1898, and reversed a decree of the district court of the United States for the southern district of New York, which dismissed a libel filed by the said William Burrill and others, owners of the bark "Kate Burrill," against your petitioners in a cause of contract, civil and maritime, and which decree adjudged that the said libelants recover from your petitioners the sum of three thousand one hundred and fifty-one dollars, with costs.

Third. The original libel was filed by the said libelants against your petitioners on the 17th day of April, 1894, to recover demurrage alleged in said libel to be due from your

petitioners to the libelants under a charter-party entered into between the said owners of the said bark "Kate Burrill" and your petitioners. The libel was dismissed by the district court, with costs, and the decree dismissing the said libel was entered in said court January 16, 1895. The said libelants appealed from the said decree to the United States circuit court of appeals for the second circuit on the 24th day of January, 1895. In the said circuit court of appeals an order was made granting to the libelants leave to make new allegations in their libel. They did file an amended libel in the circuit court of appeals, and your petitioners answered the said amended libel. Thereupon the libelants filed exceptions to the fourteenth, fifteenth, and sixteenth articles of the said answer, on the ground as to each "that the same is insufficient in the law to constitute a defense." The circuit court of appeals sustained the exceptions to the fourteenth and fifteenth articles of the said amended answer, and overruled the exception to the sixteenth article of said answer. Thereupon certain testimony was taken in the circuit court of appeals, and the cause came on to be heard in the said court, and the decree before mentioned in favor of the libelants against your petitioners was thereupon made by the said circuit court of appeals.

Fourth. The questions raised by the exception to the said fourteenth article of the said answer of your petitioners are purely questions of law. The fourteenth article alleges that under the terms of the charter-party executed between the libelants and your petitioners "the charterers' responsibility was to cease when the vessel is loaded and the bills of lading are signed." It appeared in the pleadings that the vessel proceeded from the port of New York to Pensacola, and entered upon the discharge of the charter, and took on board a full cargo of lumber, which was shipped by the charterers, your petitioners, to Rio Janeiro to consignees who had previously bought the same from your petitioners.

The master signed a bill of lading for the same, which was forwarded to the said consignees in Rio Janeiro. This bill of lading had stamped thereon the words "as per charter-party dated 7th March, 1893." The circuit court of appeals held that, notwithstanding the clause so mentioned, the charterers' responsibility did not cease when the vessel was loaded and bills of lading were signed, on the ground that the bills of lading as signed did not impose upon the cargo a lien for demurrage, pursuant to the terms of the charter-party. The charter-party did in express terms provide: "Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage." Your petitioners are advised and allege that said ruling was erroneous, and that upon a true construction of the charter-party and the bills of lading, which should be construed together, the cargo did remain subject to a lien for demurrage, and that consequently the charterers' responsibility for the demurrage ceased when the lumber was delivered on board and the bills of lading were signed, and it became the duty of the owners of the said bark, the libelants, to collect the said demurrage at the port of consignment, which they failed to do.

Fifth. The questions raised by the exception to the fifteenth article of the said answer of your petitioners are purely questions of law. The fifteenth article alleges—

"that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libelants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel any sooner than it was discharged or received.

That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libelants, acquiesced in said delay and recognized the necessity therefor."

The learned judge of the district court for the southern district of New York held that a similar article in the answer to the libel in the said court constituted a defense to the libel, and on that ground dismissed the said libel. His decision on this point was reversed by the circuit court of appeals, which held that the said article did not constitute a defense to the libel. This was put by that court on the ground that the charter-party contained a contract binding the charterers to pay demurrage at all events in case the cargo was not delivered within the time mentioned in the charter-party, no matter whether the delay was caused by their fault or not, and that the word "default" in the charter-party meant omission from whatever cause and not fault or neglect of duty. Your petitioners are advised and believe that this decision of the circuit court of appeals was erroneous in law, and that the decision of the district court in this particular was correct and should have been affirmed.

Sixth. The circuit court of appeals overruled the exception taken by the libelants to the sixteenth article of your petitioners' answer. This article set up the defense of accord and satisfaction and an account stated between the agents of libelants at Rio Janeiro and the consignees and the payment in full of all amounts due under the charter-party to the libelants. The circuit court of appeals, however, held that upon the proofs this defense was not made out. The proofs, as your petitioners are advised and allege, establish that a claim for demurrage was made by the captain of the "Kate Burrill" at Rio Janeiro, and notified by him both to

the agents of the libelants and to the consignees of the cargo; that the libelants themselves wrote to their agents in Rio Janeiro, calling their attention to the claim for demurrage, either against the government of Brazil or against the consignees of the cargo; that an account was rendered by the consignees of the cargo to the agents of the libelants at Rio Janeiro, purporting to be for all matters due to the vessel; that the balance appearing to be due by this account was paid to and accepted by the agents of the libelants and remitted to their principals, the libelants, and received and retained by them without objection; that no objection to the said settlement was ever filed by them to your petitioners or to the said consignees, and your petitioners are advised and believe that upon these undisputed facts the accounts between the parties were closed, and that there was an accord and satisfaction of all claims under the charter-party, notwithstanding the fact that no specific mention of the claim for demurrage was made in the account so rendered; that there are no allegations in the libel to impeach the said statement of account and accord and satisfaction for fraud or mistake, and that neither fraud nor mistake was proved in the circuit court of appeals.

Seventh. A certified copy of the entire record of the said cause in the said circuit court of appeals is herewith furnished, in conformity with rule 37 of this honorable court relative to cases from the circuit court of appeals.

Eighth. Your petitioners are advised and believe that the said judgment of the said United States circuit court of appeals is erroneous, and that this honorable court should require the said cause to be certified to it for its review and determination and in conformity with the provisions of section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases jurisdiction of the courts of the United States, and

for other purposes," approved March 3, 1891, the said cause being made final in the said circuit court of appeals by the said act.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the second circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said cause therein entitled "William Burrill and others, owners of the bark 'Kate Burrill,' libelants, against George W. Crossman and Herman Sielcken, respondents," to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decision of the said circuit court of appeals in the said case and every part thereof may be reversed by this honorable court.

And your petitioners will ever pray, etc.

GEO. W. CROSSMAN,
Per HERMANN SIELCKEN.
HERMANN SIELCKEN.

EVERETT P. WHEELER,
Advocate for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Hermann Sielcken, being duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition, and the facts therein stated are true, to the best of his knowledge, information, and belief.

HERMANN SIELCKEN.

Sworn to before me this 6th day of January, 1899.

[SEAL.] THORLEIF NIELSEN,
Notary Public, No. 12, *New York County.*

[Endorsed:] Supreme Court of the United States, October term, 1898. George W. Crossman and Herman Sielcken, petitioners, against William Burrill and others, owners of the bark "Kate Burrill," respondents. Motion and petition. Wheeler & Cortis, proctors for petitioners; office and post-office address, 45 Broadway, New York city, N. Y.

No. 695. Oct. 26

Brief of Wheeler for Petitioners

Office Supreme Court U. S.
FILED
JAN 16 1899
JAMES H. MCKENNEY,
Clerk

Filed Jan. 16, 1899.
United States Supreme Court,

OCTOBER TERM, 1898.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN,
Petitioners and Appellees,

vs.

WILLIAM BURRILL ET AL.,
Respondents and Appellants.

BRIEF FOR PETITIONERS ON PETITION FOR CERTIORARI.

EVERETT P. WHEELER,
Advocate for Petitioners.

Supreme Court of the United States,

OCTOBER TERM, 1898.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Petitioners,
(Respondents in Court below)

vs.

WILLIAM BURRILL and others, owners of the bark KATE BURRILL,
Respondents:
(Libellants in Court below.)

BRIEF FOR PETITIONERS.

Statement.

This is a motion for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, to review a decree rendered by that Court in favor of the libellants, which reversed a decree of the District Court of the United States for the Southern District of New York, dismissing the libel with costs.

The libel was *in personam*, filed to recover from Crossman & Brother, the present petitioners, fifty-three-days demurrage, for delay in discharging and

receiving cargo at Rio Janeiro; under a charter party of the *Kate Burrill*, entered into between the libellants and Crossman & Brother March 7, 1893. The respondents answered in the District Court, and some testimony was taken (District Court Record, pp. 19–41).*

To portions of the answer the libellants filed exceptions. These were overruled by the District Court, and upon the whole record as thus presented a decree was entered dismissing the libel January 16, 1895. From this decree an appeal was taken to the Circuit Court of the United States for the Second Circuit. That Court gave the libellants leave to amend their libel. Crossman & Brother filed an amended answer. The libellants excepted to the 14th, 15th and 16th articles of this answer on the ground as to each that the same "is insufficient in law to constitute a defense." The exceptions to the 14th and 15th articles were sustained. The exception to the 16th article was overruled. (New Proofs on Appeal, p. 94.)

Testimony was taken in the Circuit Court of Appeals upon the remaining issues (*Ibid*, pp. 81–88). A decree was rendered in favor of the libellants for the amount demanded in the libel, without interest, but with costs. The defences set up by the articles of the answer thus excepted to, are these:

1. That under the provisions of the charter party the liability of the charterer for demurrage ceased upon the execution and delivery of bills of lading to the consignees' agents (Fourteenth Article).

2. That the delay at Rio Janeiro in unloading the vessel was caused by a state of war prevailing there between the insurgents and the Government

*References are all to the original paging.

of Brazil, which made it impossible for the vessel to discharge and for the consignees to receive the cargo within the lay days (Fifteenth Article).

3. That the agents of the libellants accepted a certain sum at Rio Janeiro in satisfaction for all claims under the charter party (Sixteenth Article).

The Circuit Court of Appeals and the District Court agreed in holding that the cesser clause set up in the 14th article of the answer did not apply, because the bill of lading did not give to the shipowner a lien for demurrage. The District Court held that the defence of *vis major* set up under the 15th article of the answer was a sufficient defence. On this point the Circuit Court of Appeals disagreed with the District Court. These two questions are of great importance to the commercial world.

Both Courts held that the defence of accord and satisfaction was sufficient in law. The Circuit Court of Appeals held that it was not sufficiently proved.

The case is reported in the District Court, 65 Fed. Rep., 104.

In the Circuit Court of Appeals, 69 Fed. Rep., 747, 16 C. C. A.. 381.

In this brief it will be more convenient to consider first the validity of the defence of *vis major*. This is the point on which the learned Courts below differed.

The charter party is printed at pages 7–10 of the District Court record, and at pages ~~19–21~~ of the new proofs on appeal. The bill of lading is at pages 15, 16, of the former. 79–81

The contract for the sale of the lumber by W. H. Crossman & Brother, the charterers, to the Companhia Industrial do Brazil was made by cable in

December, 1892. The price was $28 per thousand feet, including cost, freight and commissions (Record District Court, p. 21, fol. 63, pp. 31, 32). The freight was deducted from the invoice (*Ibid.* p. 41) and was paid in Rio by the Companhia to Phipps Bros. & Co., the agents of libellants. (New proofs on Appeal, pp. 14, 15). The bill of lading was dated May 5, 1893. The amount of the invoice was paid by a draft, drawn by the charterers upon a London bank against a letter of credit, issued to the charterers, for account of the Companhia (Record, District Court, pp. 22, 23).

In due course this draft must have been taken up by the Companhia. We hear nothing more of it.

"The cargo was sold by the consignees to the sawmill belonging to Mr. Berrogam" (New proofs on Appeal, p. 95, fol. 96).

It had been from the first distinctly understood that the shipment was at the request and on account of the Companhia. It cabled to the charterers December 12, 1892: "Ship in accordance with our cablegram of December seventh" (District Court Record, p. 32, fol. 95).

POINTS.

First.

Defence of Vis Major.

The 15th article of the amended answer alleges:

Fifteenth.—And further answering respondents

allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers and Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor.

The Circuit Court of Appeals held that this defense was insufficient in law, on the ground that the charter party contained an absolute agreement to discharge the cargo in question, within a certain time, at all events. The clauses claimed to contain this agreement are:

"Cargo * * * to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second

part, or agent ($59 46/100) fifty-nine 46/100 dollars U. S. gold, or its equivalent, per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent."

The radical error in the opinion of the Circuit Court of Appeals is in their failure to consider:

(1.) That the clause as to discharging is an agreement both by the shipowner and by the consignees. The ship must discharge. The consignee must receive.

(2.) That the only provision in reference to the liability for delay in the reception of the cargo is that already quoted; which charges the charterers, not absolutely, but only in case of their *default* or that of their agent.

The exception to the Fifteenth Article was therefore not well taken. It should have been overruled. The respondents were entitled to judgment upon it, in their favor.

I.—These allegations established a case of mutual inability on the part of both vessel and consignee. No precise number of lay days is fixed by the charter. "The lay days are to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part or agent" (District Court Record, p. 9, fol. 25). If it was impossible to discharge cargo, the vessel could not be said to be ready to discharge it. It was equally impossible for the consignees to receive it. Under such circumstances there is no liability for damages against either

party. "Delivering cargo is as much the duty of the ship owner, as of the merchant."

Ford *vs.* Cotesworth, L. R., 4 Qu. B., 127; Affd. on Appeal, 5 *Ibid.*, 544.
Cunningham *vs.* Dunn, 3 Com. Pleas Div., 443.

In Ford *vs.* Cotesworth the Court of Appeals say (L. R., 5 Q. B., 547).

"The defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship, and the plaintiffs were as much prevented from doing their part as the defendants."

And BLACKBURN, J., said in the Queen's Bench (p. 133):

"Delivery of the cargo is as much the duty of the ship-owner as of the merchant."

To the same effect are

Dahl *vs.* Nelson, 6 App. Ca., 38.
Carsanego *vs.* Wheeler, 16 Fed. Rep., 248, 253.
The *Spartan*, 25 Fed. Rep., 44, 51.

II.—There is no liability for demurrage where the vessel is prevented from receiving cargo by the authorities at the port at which the cargo is to be taken on board. Under such circumstances the ship is excused.

White *vs.* Steamship Winchester Co., 23 Scottish L. R., 342.

The reasoning of this case is equally applicable to a failure on the part of the ship to discharge

the cargo. Many of the authorities referred to by the advocate for libellants are considered, and it is held that they have no application to a case where the inability to handle the cargo is caused by *vis major*.

Vis major is a valid defense in all actions upon contract unless it appear that there was an absolute agreement to perform at all events. This Court held it a defense in an action for rent.

Gates *vs.* Goodloe, 101 U. S., 612.

III.—Apart from the question already argued, it is clear upon the allegations of the answer that there was no default on the part of the charterer or his agent. Wherever the delivery of goods is prevented by a superior force which the contractor cannot control or prevent he is excused.

Geismer *vs.* Lake Shore & Michigan Southern R., 102 N. Y., 563, 571.

At page 571 the Court say:

"Here, upon the facts, which we must assume to be true, there was no *default* on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty, but they were prevented by mob violence, which the defendant could not by reasonable effort overcome."

IV.—But libellant insists that the word "*default*" means omission, and that defendants are liable, at all events, for an omission to receive the cargo, whatever the cause.

Default is defined in the Century Dictionary to be:

1. "A failing or failure; an omission of that which ought to be done; neglect to do what duty, obligation or law requires.

* * * * * *

3. A fault, an offense, a misdeed, a wrong act."

Abbott Law Dict., Vol. I., p. 356, defines it:

"The neglect or omission of a duty, or failure to perform an obligation."

It is thus defined by Lord Justice Bowen *in re* Young & Harston's Contract, 31 Ch. Div., 168, 174:

"Default is a purely relative term, just like negligence. It means nothing more, nothing less than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

And at page 173, Sir J. HANNEN says:

"Our judgment, therefore, is that where a man knowing that some act has to be done by him on a particular day, goes away, in disregard of that obligation, he is guilty of default."

Plainly the Court would have held that if he had been prevented by revolutionary violence, he would not have been guilty of default.

In Caffarini *vs.* Walker, 9 Irish Rep., Common Law, 431, 437, "default" it thus defined by FITZGERALD, J.

"'Default' would seem to embrace every failure by the defendant to perform this contract, *unless prevented by superior force, over which the defendant had no control*, such as stress of weather."

If libellant could show an express agreement in the charter that the consignee would take the cargo away at all hazards, his omission to do so might perhaps be called a "default." But in this case it was as much the duty of the owner to discharge the

cargo as it was of the consignee to receive it. The sailors would fear the shot and shell of the ironclads as much as the longshoremen. A mutual inability cannot be called the "*default*" of the charterer or his agent.

Libellants' argument really gives no effect to the word "default of the said party of the second part or agent." They construe the charter party as if these words were omitted. But they were not omitted. The Court will therefore give them effect, *and if the allegations of the answer are true it is manifest that the "detention" was by act of the public enemy, and not by "default" of the charterers or their agent.*

V.—All contracts should have a reasonable construction. It has been shown that the word "default" may mean either mere omission or a positive fault. The latter is its natural and obvious meaning. Who can doubt that the parties used it in the latter sense. What reason would there for an absolute contract by respondents to become liable at all events for a failure to discharge cargo in a remote port, over which they had no control. Libellants' captain was on the spot. It was he who could urge and expedite the discharge. What reason can be assigned for the contention that libellants supposed they had an absolute undertaking from the charterers to be liable at all events for delay at Rio.

In Bailey *vs.* De Crespigny, L. R. 4, Q. B., 180, the Court say (p. 185):

"Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to

include, were not used with reference to the possibility of the particular contingency which afterwards happens.

The word impossible in such cases is not used in a strict mathematical sense, but with reference to the course of business and its practical conduct.

In Dahl *vs.* Nelson, 6 App. Ca., 38, the Court says (p. 53):

"In matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

To the same effect is Price *vs.* Hartshorn, 44 N. Y., 94.

In this case it was held that in order to warrant such construction of a carrier's agreement as to increase his common law liability, and make it an absolute agreement to deliver at all events, the contract "ought to be clear and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both parties" (p. 99).

The Court further held that such an agreement would not be implied from a contract to deliver cargo "in like good order as it was received by correct measure or weight in the customary way without delay," but that under such a contract the carrier was not liable for a loss occasioned by the "act of God."

This limits Harmony *vs.* Bingham, on which libellants rely.

VI.—The case most relied as by the Court below is:

Sixteen hundred tons of nitrate of soda (15 U. S., App. 369; S. C. 10 C. C. A. 115; 61 Fed., 849).

There the language of the charter party was essentially different. That provides: The *Charterers* "shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid lay days as follows: Thirty working lay days for loading to commence 24 hours after her inward cargo or unnecessary ballast is finally discharged. * * * And for each and every days detention by default of" the charterers, they should pay demurrage.

The charterers were to load. The demurrage claimed was for failure to load. This was directly caused by their inability to get delivery of nitrate which they had bought. The remote cause was the revolution.

Here then was an express agreement limiting the time for loading, and a failure to load within that time by the party whose duty it was to load. Moreover there was no violence preventing loading. At page 376 (15 U. S. App.) The Court say:

"When the master of the vessel demanded the cargo, the charterers had none. Their cargo had been contracted for, but had not been delivered to them. They could not obtain possession of it. But there was no interference upon the part of the Chilian Government, or upon the part of any armed force to prevent their obtaining possession of the cargo, or handling or moving the same or placing it within reach of the vessels' tackle."

Even here Judge Ross dissented. But how radically different the two cases. In the case at bar, the agreement fixing time fixes it for discharging, which was the duty of *libellants*.

Moreover, the word "default" might well include the failure of charterers to get a cargo, which they had agreed to furnish. But it does not include the case of prevention by physical force from taking cargo away. In the one case there is no cargo to load. The question of *vis major* does not arise. *Causa proxima, non remota spectatur.* But in the case at bar the proximate cause was the actual firing between the vessels of war and the forts in the harbor. It is an abuse of language to call that *the default of the consignees.*

VII.—The other cases cited by the Circuit Court of Appeals do not support the proposition for which they are cited (new proofs on appeal, pp. 30, 31; 69 Fed. Rep., 751).

In Waugh *vs.* Morris, L. R. 8 Q. B., 202, the charterer sent the ship to a wharf at which discharge was prohibited. There was no objection to discharge in the river into another vessel, which was done. The delay was clearly the charterer's fault. The word "default" was not used.

In Cargo *ex* Argos, L. R. 5 P. C., 134, the clause read (pp. 136, 161):

"The goods to be taken out within twenty-four hours after arrival or pay £10 10S a day demurrage." The word default was not used.

In Davies *vs.* McVeagh, 4 Excheq. Div., 265, the agreement was absolute to pay demurrage if the vessel was detained more than nineteen days. The word "default" was not used.

The same is true of Lees *vs.* Yates, 3 Taunt, 387.

In Postlethwaite *vs.* Freeland, 5 App. Ca., 599, the word "default" did not occur in the Charter party. Lord Blackburn (p. 618) quotes from Ab-

bott on Shipping to the effect that where the charterer has absolutely engaged that the ship shall be discharged in a certain time, he is liable if she is not. This proposition is not disputed. But when the obligation to pay demurrage is made by the charter to depend upon the charterer's *default*, there is not an absolute engagement.

In Grant *vs.* Coverdale, 9 App. Ca., 470 (like the Nitrate case in the Ninth Circuit) the real cause of the delay was that the charterer had no cargo to put on board. It was held no defense that he was prevented by frost from transporting the cargo by canal to the place fixed for loading.

In Budgett *vs.* Binnington, 25 Q.B. Div., 320, the language was (p. 321): "*In no case* should more than seven running days (Sundays excepted), be allowed for unloading." It was held that a strike was no defense, although it prevented the shipowner as well as the consignees from doing his part in the discharge of the ship. The decision was put wholly upon the "*absolute*" language of the charter.

And now to turn to the only case cited, in which a clause existed, similar to the present:

Davis *vs.* Wallace, 3 Cliff, 123; Fed. Ca., 3657, Vol. 7, p. 182.

In this case the consignee ordered the ship to a crowded wharf. The discharge was delayed in consequence. It was held that this was caused by the "default" of the consignee.

In the case at bar no such facts appear. The article excepted to alleges that "libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason *of the act of the public enemy*," &c. Indeed, Davis *vs.* Wallace is

favorable to respondents, for it held that the charterers were not liable for a certain portion of the delay, in which the captain acquiesced. In the case at bar the article excepted to alleges (New Proofs on Appeal, p. 78):

"That the captain of the said vessel, and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor."

VIII.—The Court below, in disposing of this part of the case, entirely overlooked one essential element. The agreement is to pay demurrage for "every day's detention by default of the said party of the second part or *agent*." Whatever default existed was on the part of the second vendees of the lumber. The ship was taken alongside their wharf and the lumber discharged there. (New Proofs on Appeal, p. 45, fol. 96.) As the Circuit Court of Appeals say in their final opinion: 105

"As a matter of fact the consignees were not agents for the appellees (petitioners); they were the purchasers of the cargo."

The clause in question must certainly be strictly construed. How then can petitioners be charged for the default of those who confessedly were not their agents.

Second.

Cesser Clause.

Libellant's brief and the opinion of the Court

below devote a great deal of learning to the construction of this clause. The facts are as follows:

The charter party was made in New York, March 7, 1893, between libellants, managing owner of the *Kate Burrill;* and the petitioners, doing business under the name of W. H. Crossman & Brother (District Court Record, page 7, fol. 21). The whole vessel is chartered for a voyage from Pensacola to Rio Janeiro. Before this charter was made and in December, 1892, the cargo of lumber to be carried had been sold by the petitioners to the consignee in Rio (District Court Record, pp. 21, 22. Ex. 3, pp. 39, 40). When the vessel was loaded the lumber was "billed" or invoiced to the consignee, the Compania Industrial do Brazil (p. 22, fol. 66).

The material clause of the charter is as follows (*Ibid*, p. 9, fol. 26):

"The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed."

Bills of lading were signed by the captain at Pensacola, May 5, 1893 (*Ibid*, pp. 15, 16). They acknowledge shipment by defendants of lumber to be delivered at Rio "unto order or to their assigns," they paying freight "for the said lumber as per charter party dated 7th March, 1893, and average accustomed."

The words "as per charter party, dated 7th March, 1893," were not in the printed form of the bills of lading, but were stamped upon it in respondent's office (District Court Record, pp. 24, 25, fols. 72, 73; p. 35, fol. 103). The only object of the bills of lading was to enable respondents to attach them to a draft for the purchase price. This was drawn against a letter of credit issued by a bank in London in favor of the Companhia Industrial (*Ibid*, pp. 37, 38; fols. 111, 112). When the draft was paid the bill of lading became unimportant.

The error in the Courts below was in treating the case as if it arose between the charterer and a *bona fide* holder for value of the bill of lading; whereas the question, so far as the existence of the lien for demurrage was concerned, rested between the purchaser of the cargo who bought it before any bill of lading was issued, and the shipowner. It may very well be conceded that the authorities cited in the Court below do hold that "where the provision for cesser of liability is accompanied by a stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers were enabled to create, is not equivalent to the liability of the charterers."

It is obvious from this statement of the rule that the Court had in mind the case of a lien created by a bill of lading, existing against the owner of a portion of the cargo shipped by a particular ship, and his transferee for value and without notice. In such cases the sole contract, so far as the owner of the goods is concerned, is contained in the bill of lading, and the Courts hold that inasmuch as it was the fault of the charterer that this lien is not coextensive with that sought to be created by the charter

party the liability of the charterer for the difference still remains. As for example, in

Klink *vs.* Radford (1891), 1 Qu. B., 625,

the charterers were sued for damages caused by delay at the port of loading. This was the charterers' own fault- It was held that the cesser clause did not relieve them from liability, not only because no lien for damages caused by such delay was provided for in the bill of lading, but also because the amount of the damage was unliquidated.

In Hanson *vs.* Harold (1894) 1 Qu. B., 612, the ship was re-chartered. The difference between the freight called for by the original charter and that called for by the re-charter grew out of the fact that the first was a lump sum, and the second was so much per bushel. The oats forming the cargo shrunk during the voyage to England. It was held that the original charterers were liable for the difference in question, notwithstanding the cesser clause. The original charter gave the privilege of re-chartering the vessel at any rate of freight "without prejudice to this agreement."

These cases were undoubtedly well decided. But other cases of equal authority have held that upon facts similar to those in the case at bar, the lien created by the original charter party would remain. It follows necessarily that upon the test stated by the Court below, the lien given by the charter party was not extinguished by the issue of the bill of lading. It therefore remained when the vessel arrived at Rio Janeiro.

McLean *vs.* Fleming, 2 H. L. Sc. App., 128.

In this case the charter gave a lien on the cargo for all freight, dead freight and demurrage. The bill of lading made no mention of dead freight or demurrage. It was held by the House of Lords, affirming the Court of Session, that as between the owner of the ship and the persons for whom the charter party was effected, the lien remained, and that the issue of the bill of lading when the cargo was shipped did not impair this lien.

S. P. Gledstanes *vs.* Allen, 12 Comm. Bench, 202.

In this case the original charter was for a lump sum and a lien for this sum was given by it. Goods were shipped in Penang at a rate per cwt. which amounted to less than the lump sum. The goods were shipped by the charterers to their agents in London for sale. It was held that these agents were not entitled to the goods until they paid the lump sum, and that it was not sufficient for them to tender the freight called for by the bill of lading. The Court say that it would be otherwise if the bill of lading had been endorsed for value, and the claim had been made by a *bona fide* endorsee.

That this must be the rule is manifest. It is not denied that the respondents had a right in the original charter to impose a lien upon the cargo for demurrage. It is equally plain that they did so. How then has this lien been divested? What is there in the bill of lading which shows an intent on the part of both contracting parties to divest it? The bills of lading were drawn in New York by the petitioners. They were prepared and sent to Pensacola for signature by the Captain. The bill of lading is on one of their printed forms. (District Court Record, Page 25, fol. 73). Can it be supposed for a moment that the charterers, having effected

a charter giving a lien for demurrage, would immediately draw a bill of lading with the intention of relinquishing such lien? If any person were a party to this action who could show that the bill of lading contained the whole contract between the charters and the consignees, the petitioners no doubt would not be allowed to deny that it did. But in the suit between the original parties, or their assigns or vendees, where no new rights of a bona fide holder for value, and without notice, intervene, the charter must control.

The rule of law which allows the charterers to agree with the owners of the ship that there shall be a lien upon the cargo for demurrage, makes them for this purpose the agent of the vendee of the cargo. It was part of the contract that the goods should be shipped to the vendee in South America. The manner of shipment and the terms upon which the shipment was to be effected, were necessarily left to the petitioners, the vendors. No complaint was made of these terms by the vendees. It appears distinctly from the testimony of the Treasurer of the Companhia Industrial do Brazil, Hime, who was examined on commission, and from the letters put in evidence by the libelants, that the terms of the charter party were known to them all and were discussed in Rio Janeiro. At page 96 (new proofs on appeal, fol. 98), Hime says the captain did mention something with regard to demurrage, "and I replied to him that in conformity with his charter party he had to deliver cargo on shore, and as he had contracted to discharge the same (that is going alongside the wharf instead of doing the discharging into lighters) I had nothing to do with it."

So in the letter written by the libellants to their agents in Rio Janeiro, they say (*Ibid.*, page 87, fol. 221): 147

"We note by the charter party that there is no exception clause covering these occurrences, and it is just possible the consignees' cargo are liable."

The conduct of the parties is always cogent evidence of the construction to be given to their contracts.

Insurance Co. *vs.* Dutcher, 95 U. S., 269.

At page 273 the Court say:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

Chicago *vs.* Sheldon, 9 Wallace, 50.
General Mut. Ins. Co. *vs.* Sherwood, 14 How. U. S., 362.
Woolsey *vs.* Funke, 121 N. Y., 87, 92.
Reid *vs.* Sprague, 72 N. Y., 457, 461.
Nicoll *vs.* Sands, 131 N. Y,, 19, 24.

In this case their conduct at Rio shows that no claim was made by anybody that the bill of lading had superseded the charter party so far as the lien was concerned. On the other hand the claim

was made that the violence of the revolution was a sufficient excuse for the delay in the discharge of the cargo.

Hime, the treasurer of the Companhia, the consignee so testifies (New proofs, pp. 47-48):

"All I can say is that I am exceedingly astonished and surprised that such a suit should be brought against the charterers of the vessel, as by the terms of the charter-party, it is conclusive that once the cargo is on board and the bills of lading signed, the charterer's responsibility ceases, the captain having lien on the cargo for freight and any and every other claim."

October 11, 1893, libellants write their agents in Rio, making a claim against the Government of Brazil and suggesting one against the consignees (New proofs on Appeal, p. 87). The agents reply that there is no claim against the Government, and that they have told the captain "that he should look to his consignees to make the claim on the owners of the cargo" (*Ibid.* p. 88).

Third.

Accord and Satisfaction.

It is not disputed that the consignees of the cargo, the Companhia Industrial do Brazil, settled the ship's accounts with her agents, Phipps Brothers & Co., at Rio, and paid the latter the amount shown by the account rendered, which was remitted to libellants and received without objection.

The Circuit Court of Appeals held that this set

tlement was not binding, and could be reopened, because the claim for demurrage was not specically included in the settlement.

This was error.

I.—The claim was certainly presented and discussed at Rio. The facts bearing on the claim were disputed.

Edwin E. Hime was examined on commission. He was a merchant in Rio Janeiro (new Proofs on Appeal, p. 94, fol. 93), and director and treasurer (*thesoureiro*, p. 95, fol. 216) of the Companhia Industrial do Brazil, the consignee of the vessel and cargo (p. ~~45~~, fols. 94, 95). 105

He testifies that the *Kate Burrill* went alongside the wharf of the vendees of the lumber who had the saw mill and that "the said owners of the saw mill had sufficient storage to stow the whole of the cargo as fast as delivered by the vessel" (p. ~~45~~, 105 fol. 96). The captain made no complaint on this score (p. 96, fol. 98), but "did complain that he could not discharge the cargo as fast, or in accordance with the charter party, owing to prohibitory orders on the part of the government, there being a revolution against the government at the time, and firing in this particular locality being exceedingly heavy, and injuring life and property. This complaint was made to me, and I replied to it that I could not help him in the matter, and that he had to obey the government's orders as I had to" (p. 106 ~~46~~, fol. 97). The captain made no mention of "there being no room for storing the cargo, nor that they could not get the lumber clear of the saw mill, or that they were not selling their lumber. As far as I can recollect, there was no other vessel there" (p. ~~46~~, fol. 98).

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Wilson, the captain, and Hime both testify that a question arose about demurrage. The captain testifies in substance as follows:

I made no claim upon the consignees of the cargo for demurrage. I did tell them that I intended to claim demurrage. "They said on account of the revolution I couldn't claim any demurrage." I had nothing to do with the collection of freight. That was collected by Phipps Brothers & Co. (p. 123, fol. 148). I spoke to Phipps Brothers & Co., the agents of the ship, sometimes, as to how the ship was discharging. "I said that the ship ought to get demurrage for detaining her so long in port after her lay days were up." I said that to the manager in Phipps' office. He made no reply (p. 125, fols. 155, 156).

"As soon as our lay days were up I went to the consignees and told them they would have to pay demurrage, and they said we couldn't claim any demurrage on account of the revolution" (p. 126, fol. 157). I furnished no information to Phipps & Co. to enable them to send their account to the assignees of the cargo (p. 126, fol. 159). I knew that our charter party called for demurrage, so much a day, day by day (p. 127, fol. 160). I said to Phipps Brothers, 'The consignees ought to pay the demurrage for detaining the vessel so long.' They said they didn't know" (p. 127, fol. 162).

William Burrill, one of the libellants, and one of the owners of the *Kate Burrill*, was called as a witness. He does not deny that Phipps Brothers & Co. were agents for the ship in Rio Janeiro, or that they collected and remitted to him the freight less the charges. He writes them October 11, 1893, the following very significant letter (p. 147):

"We presume the delay and extra cost of provisions and labor, &c., will be a very serious additional expense for which the Government of Brazil

should be liable, in which case we hope you will claim for us the utmost dollar. We note by the C/Party that there is no exception clause covering these occurrences and it's just possible the consignees' cargo are liable."

The answer to this is dated November 17, 1893, eleven days before the discharge of the cargo was completed (p. 143, fol. 209), and makes the following statement (pp. ~~87, 88~~ 147,148, ~~fols. 222, 223~~) to p. 94

"Since writing on 16th ulto. we are in receipt of your favor of 11th idem.

There is absolutely no claim against the Government that could be made good for loss occasioned by delays, &c., in consequence of the present revolutionary troubles, and every branch of trade is suffering severely without any prospect of redress.

We saw Captain Wilson a day or two ago when he told us he had still about 2,000 pcs. on board and waiting for his consignees to take them away. It is we understand most difficult to get labour and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times but have told him that he should look to his consignees to make the claim on the owners of the cargo."

Phipps Brothers & Co. notified the Companhia "that they were not to give the captain any money and that the accounts of the vessel had to be liquidated with them (Mess. P. Bro. & Co.) and not with the captain" (p. 65, fol. 95).

It is further proved by Hime that an account was rendered by him to Phipps Brothers & Co. for the amount due under the charter party, and that the amount shown by it to be due was paid and received in full settlement of all claims under the charter party (pp. ~~47, 48~~ 107,108, fols. 100 to 104).

The account rendered by the consignee to Phipps Brothers & Co. is at pages 51 and 52, and is marked Exhibit A. It is a duplicate of the account received from them by the libellant Burrill (pp. 68, 69, fol. 1656), which is marked Libellant's Exhibit 3 (p. 85). He also received an account current from them, showing their collections and remittances on account of the *Kate Burrill* (p. 69, fol. 167, Ex. 4, p. 88).

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II.—It is plain from the testimony already detailed, which is undisputed, that Phipps Brothers & Co. were the general agents in Rio Janeiro for the libellants in all matters relating to the *Kate Burrill*. The rule applicable to such a case is well settled.

1 Am. & Eng. Encyclopædia of Law, 2nd Ed., p. 1022.

"A general agent for the management of the business of the principal has an authority coextensive in scope with the business. He must necessarily possess and exercise the same power and authority that his principal could if present."

This proposition is abundantly sustained by authority.

Watteau *vs.* Fenwick, 1 Q. B. (1893), 346.

Hubbard *vs.* Ten Broeck, 124 Pa., 291.

Cummings *vs.* Sergeant, 9 Metc. (Mass.), 172.

Bergenthal *vs.* Fiebrantz, 48 Wis., 435.

The same rule was applied to contracts made by the cashier of a bank in

Minor *vs.* Mechanics' Bank, 1 Pet., 46

Bridenbecker *vs.* Lovell, 32 Barb., 9.

The question is whether what the agent did was "in the course of his employment;" not whether it was specifically authorized.

New Orleans Co. *vs.* Hanning, 15 Wall., 649.

Baltimore Trust Co. *vs.* Hambleton, 40 Lawy. Rep. Ann., 317, 238.

The position of a general agent is certainly not inferior to that of a master in a foreign port. The rule as to his authority is well stated by Kay, Law of Shippers and Seamen, Sec. 400, p. 283 (2d Ed.):

"He has authority in a foreign port to settle accounts for freight, demurrage and delay and all such matters."

To the same effect is

Alexander *vs.* Dowie, 1 Hurlst. & N., 152.

Baron MARTIN (p. 156):

"WILLES, J., on the trial held that of necessity the captain had authority to settle all such matters (lay-days and demurrage), and that business could not be carried on unless the captain's agreement under such circumstances was binding. I concur with him in thinking that the captain must necessarily have authority to make such settlements, otherwise persons having to make payments abroad would be placed under insuperable difficulties."

But in the case at bar the question is whether an agent charged with the general management of a ship's business, and amongst other things to collect the amount due under the charter party, is author-

ized to liquidate this amount. If such an agent is not authorized to liquidate the amount, it is obvious that the transaction can only be had by the express authority of the principal. As pointed out by Baron Martin such a rule would place persons having to make payments abroad under insuperable difficulties.

III.—One reason for the rule on this subject is the injustice that would be done to parties dealing with the shipper, if there was no one present who could settle controversies relating to her voyage. In the present case the charter party gives the vessel "an absolute lien upon the cargo for all freight, dead freight, and demurrage" (p. 9, fol. 26).

The Circuit Court of Appeals has held that the bill of lading is not as extensive as the charter; that under its terms there would be a lien only for demurrage caused by the neglect of the consignee (p. 89, fol. 47), and that under the charter, *vis major* at Rio Janeiro was no defense to the claim for demurrage (p. 92). The learned District Judge held otherwise. Certainly a question upon which learned Judges have differed was debatable, and therefore a fair one for settlement. Moreover, according to the captain's testimony, the failure to discharge the cargo in time was caused by the neglect of the vendee of the lumber to whom the consignee directed him to make delivery (p. ~~58, fol.~~ 119 137). He says as to the negligence of the consignee's agent, "There wasn't enough water to get into the dock" (p. 119, fol. 138). I made objection to the slowness of the discharge of the cargo to the consignees. "They told me as soon as that other vessel got out, they would take the cargo out as fast as we could discharge her." I was ready and

able to discharge the cargo faster than the consignees received it. "They hadn't warehouse room to put the cargo away from the ship." The wharf "was pretty well piled up with lumber by the saw mill." I complained again to the consignees respecting the suspension of the discharge of the cargo. "They said there was no room to put the lumber away on account of the trouble. They couldn't gett he lumber clear of the saw mill. They were not selling their lumber. When the other vessel was there the place was filled up. There was no place to put it" (p. ~~61~~) 121

If this testimony is true, it is plain that the captain could have enforced his lien upon the cargo for demurrage. If such lien had been enforced, there seems no reasons to doubt that it wonld have compelled a settlement. In any case no attempt was made to enforce the lien for demurrage. Instead of this, the ship' s agents presented an account which was paid in full, and the ship went away.

There was laches on the part of the captain and ship's agents in the failure, under the circumstances, to claim and enforce a lien, and they ought not now to be allowed to enforce the present demand against innocent consignors.

Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96.

In the case at bar if the libellants or their agents had acted promptly, as above shown, it is altogether probable that the respondents would have had some remedy against the consignees, which is now lost.

Penn Mutual Co. *vs.* Austin, 168 U. S., 685, 698.

IV.—The libellants accepted the remittance from Phipps Brothers & Co. without objection, and so far as appears, have never repudiated it in any way. When this payment was received by the libellants they received a copy of the statement rendered by the consignees (p. 62). The correspondence at pages 87 and 88 shows that libellants then had full information as to the facts. Under these circumstances their receiving the remittance without objection was a ratification of whatever their agents had done.

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147, 148

Palmerton *vs.* Huxford, 4 Denio, 166.

V.—The amount due in Rio Janeiro under the Charter Party, was unliquidated. It was uncertain whether there was a valid claim for demurrage, and if any, for how many days it was payable. It was uncertain as to what charges could properly be deducted from this amount. The claims on both sides are therefore unliquidated.

Nassoiy *vs.* Tomlinson, 148 N. Y. 326.

Where this is the case, the acceptance of a smaller amount than that actually due in satisfaction of the whole amount due, is a good accord and satisfaction.

Bofinger *vs.* Tuyes, 120 U. S., 198.
United States *vs.* Child, 12 Wall, 232.
Fuller *vs.* Kemp, 138 N. Y., 231.

In this case the party receiving the check kept it, but wrote that he accepted it as part payment only. The maker thereupon notified him that ihe check was sent as payment in full. It was held that under these circumstances the protest was un-

availing to the payee, and that his using the check amounted to an accord and satisfaction.

To the same effect is Davenport *vs.* Wheeler, 7 Cowen, 231.

In this case, the Court say :

" Having violated the contract (suppose on both sides) the matter rested in compromise. * * * The debt was unliquidated in its nature, but by the acts of the parties it was liquidated and paid. They ought not afterwards to be allowed to go into evidence upon it.

Fourth.

Account Stated.

When the business in Rio Janeiro was concluded an account was rendered to Phipps Brothers & Co. for the amount due the ship. This account was accepted by them and no objection appears to have been taken to it before the filing of the libel. The libel itself does not contain any allegations apt to satisfy the Court that this account stated should be opened. There is no allegation of fraud or mistake. Under these circumstances the account stated should not be opened. Not being opened it is a final settlement of all matters in difference under the charter party.

There is some confusion in the cases owing to the failure to discriminate between an account stated, as evidence of a balance to recover which suit is brought, and an account stated as a defense to a

suit. It is often said in reference to the first class of cases that the account can be opened for fraud or mistake. But no authority has been found in which where an account has been stated, and a balance appearing to be due has been paid in full, the party receiving the payment has been allowed to open the settlement thus effected, upon proof that an item which ought to have been included in the account was not included in it, or that upon a proper construction of the contract he was entitled to more than was allowed him by the account.

Laycock *vs.* Pickles, 4 Best & S. 497.

In this case Mr. Justice BLACKBURN thus states the rule (p. 506):

"The stating of the accounts itself was a sufficient consideration to support this action. * * * It is not necessary, in order to make out a real account stated that the debts should be debts *in presenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had really been paid down on each side; and the balance is recoverable as if money had really been taken in satisfaction; subject to this, that where some of the items are such that if they had been actually paid, the party paying them would have been able to have recovered them back as on a failure of consideration, the account stated would be invalidated."

It cannot be contended that the claim for demurrage was not included in the settlement. It has been already shown that the validity of this claim was fully discussed at Rio Janeiro between the various parties. The facts were well known to them all. There can, therefore, be no ground for claim-

ing mistake under such circumstances. The account will not be opened.

Wilson *vs.* Frisbee, 57 Ga., 269.
Quinlan *vs.* Keiser, 66 Mo., 603.
Linville *vs.* State, 130 Ind., 210.

In the case cited by the Circuit Court of Appeals (Perkins *vs.* Hart, 11 Wheat., 237), the items sued for arose outside the contract, respecting which the settlement had been made. In the case at bar they are claimed under that contract.

Fifth.

The clauses in the charter party which have been construed by the Courts below are of constant occurrence in such instruments. The construction put upon them is, we believe, unjust and not in accordance with their fair interpretation or with the understanding of commercial men. The questions arising upon the record have never been determined by this Court. We ask that a *certiorari* may be granted in order that they may be deliberately heard and finally decided.

EVERETT P. WHEELER,
Advocate for Petitioners.

Brief of Petitioners for Certiorari

Filed Mar 8, 1900.

United States Supreme Court

OCTOBER TERM, 1899.

No. 187.

GEORGE W. GROSSMAN AND HERMAN SIEBECKER,
Petitioners and Appellees,

vs.

WILLIAM BURRILL ET AL.,
Respondents and Appellants.

BRIEF FOR PETITIONERS.

EVERETT P. WHEELER,
Attorney for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1899.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Petitioners,
(Respondents in Court below,)

vs.

WILLIAM BURRILL and others, owners of the bark KATE BURRILL,
Respondents,
(Libellants in Court below.)

BRIEF FOR PETITIONERS.

Statement.

In this case, this Court, in January, 1899, granted a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, to review a decree rendered by that Court in favor of the libellants, which reversed a decree of the District Court of the United States for the Southern District of New York, dismissing the libel with costs.

The libel was *in personam*, filed to recover from Crossman & Brother, the present petitioners, fifty-three days' demurrage, for delay in discharging and receiving a cargo of lumber at Rio Janeiro; under a charter party of the *Kate Burrill*, entered into between the libellants and respondents March 7, 1893. The respondents answered in the District Court and some testimony was taken (Record, pp. 10–27).

To portions of the answer the libellants filed exceptions. These were overruled by the District

Court, and upon the whole record as thus presented a decree was entered dismissing the libel January 16, 1895. From this decree an appeal was taken to the United States Circuit Court for the Second Circuit. That Court gave the libellants leave to amend their libel. Crossman & Brother filed an amended answer. The libellants excepted to the 14th, 15th and 16th articles of this answer on the ground as to each that the same "is insufficient in law to constitute a defense." The exceptions to the 14th and 15th articles were sustained. The exception to the 16th article was overruled (p. 38).

Testimony was taken in the Circuit Court of Appeals upon the remaining issues (pp. 63-94). A decree was rendered in favor of the libellants for the amount demanded in the libel, without interest, but with costs. The defences set up by the articles of the answer thus excepted to, are these:

1. That under the provisions of the charter party the liability of the charterer for demurrage ceased upon the execution and delivery of bills of lading to the consignees' agent (Fourteenth Article).

2. That the delay at Rio Janeiro in unloading the vessel was caused by a state of war prevailing there between the insurgents and the Government of Brazil, which made it impossible for the vessel to discharge and for the consignees to receive the cargo within the lay days (Fifteenth Article).

3. That the agents of the libellants accepted a certain sum at Rio Janeiro in satisfaction for all claims under the charter party (Sixteenth Article).

The Circuit Court of Appeals and the District Court agreed in holding that the cesser clause set up in the 14th article of the answer did not apply, because the bill of lading did not give to the shipowner a lien for demurrage. The District Court held that the defence of *vis major* set up under the 15th article of the answer was a sufficient defence.

On this point the Circuit Court of Appeals disagreed with the District Court.

Both Courts held that the defence of accord and satisfaction was sufficient in law. The Circuit Court of Appeals held that it was not sufficiently proved.

The case is reported in the District Court, 65 Fed. Rep., 104.

In the Circuit Court of Appeals, 69 Fed. Rep., 747, 16 C. C. A., 381, 35 U. S. App. 608, 62 U. S. App. 368.

In this brief it will be more convenient to consider first the validity of the defence of *vis major*. This is the point on which the learned Courts below differed.

The charter party (dated March 7, 1893) is printed at pages 5 and 6 of the record. The bill of lading is at page 9.

The lumber which composed the cargo had, before the charter was made, been sold by W. H. Crossman & Brother, the charterers, to the Companhia Industrial do Brazil. The contract was made by cable in December, 1892. The bill of lading is dated May 5, 1893. The price was $28 per thousand feet, including cost, freight and commissions, (p. 13, p. 21). The freight was deducted from the invoice (p. 27), and was paid in Rio by the Companhia to Phipps Bros. & Co., the agents of libellants (pp. 63-94). The amount of the invoice was paid by a draft, drawn by the charterers upon a London bank against a letter of credit, issued to the charterers, for account of the Companhia (Record, pp. 13-14).

In due course this draft must have been taken up by the Companhia. We hear nothing more of it.

It had been from the first distinctly understood that the shipment was at the request and on account of the Companhia. It cabled to the charterers December 12, 1892: "Ship in accordance with our cablegram of December seventh" (p. 21).

POINTS.

First.

Defence of Vis Major.

The 15th article of the amended answer alleges:

Fifteenth.—And further answering respondents allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor.

The Circuit Court of Appeals held that this defense was insufficient in law, on the ground that the charter party contained an absolute agreement by the charterers to discharge the cargo in question, within a certain time, at all events. The clauses claimed to contain this agreement are:

"Cargo * * * to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written

notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent ($59 46/100) fifty-nine 46/100 dollars U. S. gold, or its equivalent, per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent."

The radical error in the opinion of the Circuit Court of Appeals is in their failure to consider:

(1.) That the clause as to discharging is a mutual agreement binding both upon shipowner and consignees. The ship must discharge. The consignee must receive.

(2.) That the only provision in reference to the liability for delay in the reception of the cargo is that already quoted; which charges the charterers, not absolutely, but only in case of their *default* or that of their agent.

The exception to the Fifteenth Article was therefore not well taken. It should have been overruled. The respondents were entitled to judgment upon it, in their favor.

I.—These allegations established a case of mutual inability on the part of both vessel and consignee. No precise number of lay days is fixed by the charter. "The lay days are to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part or agent" (p. 5). If it was impossible to discharge cargo, the vessel could not be said to be ready to discharge it. It was equally impossible for the consignees to receive it. Under such circumstances there is no liability for damages against either party. "Delivering cargo is as much the duty of the shipowner as of the merchant."

Ford *vs.* Cotesworth, L. R., 4 Qu. B., 127; Affd. on Appeal, 5 *Ibid.*, 544.
Cunningham *vs.* Dunn, 3 Com. Pleas Div., 443.

In Ford *vs.* Cotesworth the Court of Appeals say (L. R., 5 Q. B., 547):

"The defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship, and the plaintiffs were as much prevented from doing their part as the defendants."

And BLACKBURN, J., said in the Queen's Bench (p. 133):

"Delivery of the cargo is as much the duty of the ship-owner as of the merchant."

To the same effect are

Dahl *vs.* Nelson, 6 App. Ca., 38.
Carsanego *vs.* Wheeler, 16 Fed. Rep., 248, 253.
The *Spartan*, 25 Fed. Rep., 44, 51.

The Captain knew that it was his duty to discharge the cargo. Hime testifies (p. 66):

"The captain of the vessel, Thomas Wilson, did complain that he could not discharge the vessel as fast, or in accordance with the Charter Party."

II.—There is no liability for demurrage where the vessel is prevented from receiving cargo by the authorities at the port at which the cargo is to be taken on board. Under such circumstances the ship is excused.

White *vs.* Steamship Winchester Co., 23 Scottish, L. R., 342.

The reasoning of this case is equally applicable to a failure on the part of the ship to discharge the cargo. Many of the authorities referred to by the advocate for libellants are considered, and it is held that they have no application to a case where the inability to handle the cargo is caused by *vis major*.

Vis major is a valid defense in all actions upon contract unless it appear that there was an abso-

lute agreement to perform at all events. This Court held it a defense in an action for rent.

Gates *vs.* Goodloe, 101 U. S., 612.

III.—Apart from the question already argued, it is clear upon the allegations of the answer that there was no default on the part of the charterer or his agent. Wherever the delivery of goods is prevented by a superior force which the contractor cannot control or prevent, he is excused.

Geismer *vs.* Lake Shore & Michigan Southern R., 102 N. Y., 563, 571.

At page 571 the Court say:

"Here, upon the facts, which we must assume to be true, there was no *default* on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty, but they were prevented by mob violence, which the defendant could not by reasonable effort overcome."

IV.—But libellant insists that the word "*default*" means omission, and that defendants are liable, at all events, for an omission to receive the cargo, whatever the cause.

Default is defined in the Century Dictionary to be:

1. "A failing or failure; an omission of that which ought to be done; neglect to do what duty, obligation or law requires.

* * * * * *

3. A fault, an offense, a misdeed, a wrong act."

Abbott Law Dict., Vol. I., p. 356, defines it:

"The neglect or omission of a duty, or failure to perform an obligation."

It is thus defined by Lord Justice Bowen *in re* Young & Harston's Contract, 31 Ch. Div., 168, 174:

"Default is a purely relative term, just like

negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

And at page 173, Sir J. HANNEN says:

"Our judgment, therefore, is that where a man knowing that some act has to be done by him on a particular day, goes away, in disregard of that obligation, he is guilty of default."

Plainly the Court would have held that if he had been prevented by revolutionary violence, he would not have been guilty of default.

In Caffarini *vs.* Walker, 9 Irish Rep., Common Law, 431, 437, "default" is thus defined by FITZGERALD, J.

"'Default' would seem to embrace every failure by the defendant to perform his contract, *unless prevented by superior force, over which the defendant had no control*, such as stress of weather."

If libellant could show an express agreement in the charter that the consignee would take the cargo away at all hazards, his omission to do so might perhaps be called a "default." But in this case it was as much the duty of the owner to discharge the cargo as it was of the consignee to receive it. The sailors would fear the shot and shell of the ironclads as much as the longshoremen. A mutual inability cannot be called the "*default*" of the charterer or his agent.

Libellants' argument really gives no effect to the word "default of the said party of the second part or agent." They construe the charter party as if these words were omitted. But they were not omitted. The Court will therefore give them effect, and if the allegations of the answer are true it is manifest that the "detention" was by act of the public enemy, and not by "default" of the charterers or their agent.

V.—All contracts should have a reasonable construction, with reference to the circumstances of the case, and the probable intention of parties. When a word used is ambiguous, these considerations should determine the meaning to be given to it by the Court.

It has been shown that the word "default" may mean either mere omission or a positive fault. The latter is its natural and obvious meaning. Who can doubt that the parties used it in the latter sense? Libellants seek to charge respondents not for their own fault, but for that of the consignees who were the vendees of the lumber. What reason would there be for an absolute undertaking by respondents to become liable at all events for a failure to discharge cargo in a remote port, over which they had no control? Libellants' captain was on the spot. It was he who could urge and expedite the discharge. On the other hand, the cargo was to be received, not by respondents' agent, but by their vendee. All this was known when the contract was made. The parties must, therefore, have understood that the charterers would be liable only for delay caused by their own fault.

In Bailey *vs.* DeCrespigny, L. R. 4, Q. B., 180, the Court say (p. 185):

"Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

The word impossible in such cases is not used in a strict mathematical sense, but with reference to the course of business and its practical conduct.

In Dahl *vs.* Nelson, 6 App. Ca., 38, the Court says (p. 53):

"In matters of business, a thing is said to be im

possible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

To the same effect is Price *vs.* Hartshorn, 44 N. Y., 94.

In this case it was held that in order to warrant such construction of a carrier's agreement as to increase his common law liability, and make it an absolute agreement to deliver at all events, the contract "ought to be clear and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both parties" (p. 99).

The Court further held that such an agreement would not be implied from a contract to deliver cargo "in like good order as it was received by correct measure or weight in the customary way without delay," but that under such a contract the carrier was not liable for a loss occasioned by the "act of God."

This limits Harmony *vs.* Bingham, on which libellants rely.

VI.—Another clause of the charter party throws light on the construction of the lay-day clause (p. 6):

"Vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers."

It is argued by libellants that this clause makes the charterers guarantors of the safety of the designated anchorage. Not so. This clause qualifies the demurrage clause. It must be held to have been inserted with reference to the conditions which might prevail at Rio, and to provide that the discharge need not go on unless the anchorage ground should continue safe.

An analogous case is

Carlton S. S. Co. *v.* Castle Mail Packets Co. [1898] A. C., 486; Affg [1897] 2 Q. B., 485.

There the charter party provided that the steamer was to "load in the customary manner (Sundays and holidays excepted) always afloat." It turned out that the state of the tides was such that she could not for several days after the loading had begun continue to take on cargo and remain afloat. It was held by the House of Lords, affirming the judgment of the Court of Appeal, that the charter must be construed with reference to this condition of the harbor, and that the charterer was not liable for not providing a berth where the ship could remain "aways afloat." In other words the obligation which would otherwise have been upon the charterer was held to be qualified by the clause referred to.

VII.—This construction of the charter party is not inconsistent with the case most relied on in the Court below.

Sixteen hundred tons of nitrate of soda (15 U. S., App. 369; S. C., 10 C. C. A. 115; 61 Fed., 849).

There the language of the charter party was essentially different. That provides: The *Charterers* "shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid lay days as follows: Thirty working lay days for loading, to commence 24 hours after her inward cargo or unnecessary ballast is finally discharged. * * * And for each and every day's detention by default of" the charterers, they should pay demurrage.

The charterers were to load. The demurrage claimed was for failure to load. This was directly caused by their inability to get delivery of nitrate which they had bought. The remote cause was the revolution.

Here, then, was an express agreement limiting the time for loading, and a failure to load within that time by the party whose duty it was to load. Moreover, there was no violence preventing loading.

At page 376 (15 U. S. App.) the Court say :

"When the master of the vessel demanded the cargo, the charterers had none. Their cargo had been contracted for, but had not been delivered to them. They could not obtain possession of it. But there was no interference upon the part of the Chilian Government or upon the part of any armed force to prevent their obtaining possession of the cargo, or handling or moving the same, or placing it within reach of the vessels' tackle."

Even here Judge Ross dissented. But how radically different the two cases. In the case at bar, the agreement fixing time fixes it for discharging, which was the duty of *libellants*.

Moreover, the word "default" might well include the failure of charterers to get a cargo which they had agreed to furnish. But it does not include the case of prevention by physical force from taking cargo away. In the one case there is no cargo to load. The question of *vis major* does not arise. *Causa proxima, non remota spectatur.* In the case at bar the proximate cause was the actual firing between the vessels of war and the forts in the harbor. It is an abuse of language to call that *the default of the charterer.*

VIII.—The other cases cited by the Circuit Court of Appeals do not support the proposition for which they are cited.

In Waugh *vs.* Morris, L. R. 8 Q. B., 202, the charterer sent the ship to a wharf at which discharge was prohibited. There was no objection to discharge in the river into another vessel, which was done. The delay was clearly the charterer's fault. The word "default" was not used.

In Cargo *ex* Argos, L. R. 5 P. C., 134, the clause read (pp. 136, 161) :

"The goods to be taken out within twenty-four hours after arrival or pay £10 10s. a day demurrage." The word default was not used.

In Davies *vs.* McVeagh, 4 Excheq. Div., 265, the agreement was absolute to pay demurrage if the vessel was detained more than nineteen days. The word "default" was not used.

The same is true of Lees *vs.* Yates, 3 Taunt., 387.

In Postlethwaite *vs.* Freeland, 5 App. Ca., 599, the word "default" did not occur in the charter party. Lord Blackburn (p. 618) quotes from Abbott on Shipping to the effect that where the charterer has absolutely engaged that the ship shall be discharged in a certain time, he is liable if she is not. This proposition is not disputed. But when the obligation to pay demurrage is made by the charter to depend upon the charterer's *default*, there is not an absolute engagement.

In Grant *vs.* Coverdale, 9 App. Ca., 470 (like the Nitrate case in the Ninth Circuit) the real cause of the delay was that the charterer had no cargo to put on board. It was held no defense that he was prevented by frost from transporting the cargo by canal to the place fixed for loading.

In Budgett *vs.* Binnington, 25 Q. B. Div., 320, the language was (p. 321): "*In no case* should more than seven running days (Sundays excepted), be allowed for unloading." It was held that a strike was no defense, although it prevented the shipowner as well as the consignees from doing his part in the discharge of the ship. The decision was put wholly upon the "*absolute*" language of the charter.

And now to turn to the only case cited, in which a clause existed, similar to the present:

Davis *vs.* Wallace, 3 Cliff, 123; Fed. Ca., 3657, Vol. 7, p. 182.

In this case the consignee ordered the ship to a crowded wharf. The discharge was delayed in consequence. It was held that this was caused by the "default" of the consignee.

In the case at bar no such facts appear. The article excepted to alleges that "libellants were

prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason *of the act of the public enemy*," &c. Indeed Davis *vs.* Wallace is favorable to respondents, for it held that the charterers were not liable for a certain portion of the delay, in which the captain acquiesced. In the case at bar the article excepted to alleges (p. 50):

"That the captain of the said vessel, and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor."

IX.—The Court below, in disposing of this part of the case, entirely overlooked one essential element. The agreement is to pay demurrage for "every day's detention by default of the said party of the second part or *agent*." Whatever default existed was on the part of the second vendees of the lumber. The ship was taken alongside their wharf and the lumber discharged there (p. 66). As the Circuit Court of Appeals say in their final opinion (p. 96):

"As a matter of fact the consignees were not agents for the appellees (petitioners); they were the purchasers of the cargo."

The clause in question must certainly be strictly construed. How then can petitioners be charged for the default of those who confessedly were not their agents?

Second.

Cesser Clause.

The facts relating to the cesser clause are as follows:

The charter party was made in New York, March 7, 1893, between libellants, managing owner of the

Kate Burrill; and the petitioners, doing business under the name of W. H. Crossman & Brother (p 5). The whole vessel is chartered for a voyage from Pensacola to Rio Janeiro. Before this charter was made and in December, 1892, the cargo of lumber to be carried had been sold by the petitioners to the consignee in Rio (p. 13, Ex. 3, p. 26). When the vessel was loaded the lumber was "billed" or invoiced to the consignee, the Companhia Industrial do Brazil (p. 13).

The material clause of the charter is as follows (p. 6):

"The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed."

Bills of lading were signed by the captain at Pensacola, May 5, 1893 (p. 9). They acknowledged shipment by defendants of lumber to be delivered at Rio "unto order or to their assigns," they paying freight "for the said lumber as per charter party dated 7th March, 1893, and average accustomed."

The only object of the bills of lading was to enable respondents to attach them to a draft for the purchase price. This was drawn against a letter of credit issued by a bank in London in favor of the Companhia Industrial (*Ibid*, pp. 24–25). When the draft was paid the bill of lading became unimportant.

I.—The error in the Courts below was twofold.

(*a.*) They failed to discriminate between cases

like the present where the delay was in discharging, and the discharge was not made by the charterer, and cases where the delay was that of the charterer in loading.

As for example, in

Klink *vs.* Radford [1891], 1 Qu. B., 625,

the charterers were sued for damages caused by delay at the port of loading. This was the charterers' own fault. It was held that the cesser clause did not relieve them from liability, not only because no lien for damages caused by such delay was provided for in the bill of lading, but also because the amount of the damage was unliquidated.

(*b.*) They treatedthe case as if it arose between the charterer and a *bona fide* holder for value of the bill of lading; whereas the controversy, so far as the existence of the lien for demurrage was concerned, was between the purchaser of the cargo who bought it before any bill of lading was issued, and the shipowner. It may be conceded that the authorities cited in the Court below do hold that "where the provision for cesser of liability is accompanied by a stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers were enabled to create, is not equivalent to the liability of the charterers."

It is obvious from this statement of the rule that the Court had in mind the case of a lien created by a bill of lading, existing against the owner of a portion of the cargo shipped by a particular ship, and his transferee for value and without notice. In such cases the sole contract, so far as the owner of the goods is concerned, is contained in the bill of lading, and the Courts hold tkat inasmuch as it was the fault of the charterer that this lien is not coextensive with that sought to be created by the charter party, the liability of the charterer for the difference still remains.

In Hanson *vs.* Harold [1894], 1 Qu. B., 612, the ship was re-chartered. The difference between the freight called for by the original charter and that called for by the re-charter grew out of the fact that the first was a lump sum, and the second was so much per bushel. The oats forming the cargo shrunk during the voyage to England. It was held that the original charterers were liable for the difference in question, notwithstanding the cesser clause. The original charter gave the privilege of re-chartering the vessel at any rate of freight "without prejudice to this agreement."

This case was undoubtedly well decided upon its own facts. But other cases of equal authority have held that upon facts like those in the case at bar, the lien created by the original charter party remains. It follows necessarily that upon the test stated by the Court below, the lien given by the charter party was not extinguished by the issue of the bill of lading. It therefore remained when the vessel arrived at Rio Janeiro.

McLean *vs.* Fleming, 2 H. L. Sc. App., 128.

In this case the charter gave a lien on the cargo for all freight, dead freight and demurrage. The bill of lading made no mention of dead freight or demurrage. It was held by the House of Lords, affirming the Court of Session, that as between the owner of the ship and the persons for whom the charter party was effected, the lien remained and that the issue of the bill of lading when the cargo was shipped did not impair this lien.

S. P. Gledstanes *vs.* Allen, 12 Comm. Bench, 202.

In this case the original charter was for a lump sum and a lien for this sum was given by it. Goods were shipped in Penang at a rate per cwt. which amounted to less than the lump sum. The goods were shipped by the charterers to their agents in London for sale. It was held that these agents were not entitled to the goods until they paid the

lump sum, and that it was not sufficient for them to tender the freight called for by the bill of lading. The Court says that it would be otherwise if the bill of lading had been endorsed for value, and the claim had been made by a *bona fide* endorsee.

II.—In the case at bar the charter gave respondents a lien upon the cargo for demurrage (p. 6). How then has this lien been divested? What is there in the bill of lading which shows an intent on the part of both contracting parties to divest it? The bills of lading were drawn in New York by the petitioners. They were prepared and sent to Pensacola for signature by the Captain. The bill of lading is on one of their printed forms (p. 15, Marg., p. 25). Can it be supposed for a moment that the charterers, having effected a charter giving a lien for demurrage, would immediately draw a bill of lading with the intention of relinquishing such lien? If any person were a party to this action who could rightfully allege that the bill of lading contained the whole contract between the charterers and the consignees, the petitioners might not be allowed to deny that it did. But in a suit between the original parties, or their assigns or vendees, where no new rights of a *bona fide* holder for value, and without notice, intervene, the charter must control.

As the lien for demurrage remained, the cesser clause applied the remedy of the shipowners against the charterers ceased when the vessel was loaded and bills of lading were signed, and their sole remedy was to enforce the lien against the cargo and its consignee.

It was part of the contract that the goods should be shipped to the vendee in South America. The manner of shipment and the terms upon which the shipment was to be effected, were necessarily left to the vendors. No complaint was made of these terms by the vendee. It appears distinctly from the testimony of the Treasurer of the

Companhia Industrial do Brazil, Hime, who was examined on commission, and from the letters put in evidence by the libellants, that the terms of the charter party were known to them all, and were discussed in Rio Janeiro. At page 66, Hime says the captain did mention something with regard to demurrage, "and I replied to him that in conformity with his charter party he had to deliver cargo on shore, and as he had contracted to discharge the same (that is going alongside the wharf instead of doing the discharging into lighters) I had nothing to do with it."

So in the letter written by the libellants to their agents in Rio Janeiro, they say (*Ibid.*, page 94):

"We note by the charter party that there is no exception clause covering these occurrences, and it is just possible the consignees' cargo are liable."

III.—This view of the construction of the contract is supported by a consideration of the clause as to lay days (*ante.*, p. 5). They are to commence from the time the vessel is ready to receive or discharge cargo. Demurrage is payable "day by day." For charterers' delay in furnishing cargo they could be made liable at once. For delay of the consignees in receiving the cargo, they could be made liable at once. The Captain has power to enforce his claim against them by taking advantage of the lien on the cargo for demurrage. For this reason charterers' liability for demurrage ceases when the vessel is loaded and bills of lading are signed.

IV.—The conduct of the parties is always cogent evidence of the construction to be given to their contracts.

Insurance Co. *vs.* Dutcher, 95 U. S., 269.

At page 273 the Court say:

"The practical interpretation of an agreement

by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

Chicago *vs.* Sheldon, 9 Wallace, 50.
General Mut. Ins. Co. *vs.* Sherwood, 14 How. U. S., 362.
Woolsey *vs.* Funke, 121 N. Y., 87, 92.
Reid *vs.* Sprague, 72 N. Y., 457, 461.
Nicoll *vs.* Sands, 131 N. Y., 19, 24.

In this case their conduct at Rio shows that no claim was made by anybody that the bill of lading had superseded the charter party so far as the lien was concerned. On the other hand the claim was made that the violence of the revolution was a sufficient excuse for the delay in the discharge of the cargo.

Hime, the treasurer of the Companhia, the consignee, so testifies, (p. 67):

"All I can say is that I am exceedingly astonished and surprised that such a suit should be brought against the charterers of the vessel, as by the terms of the charter-party, it is conclusive that once the cargo is on board and the bills of lading signed, the charterer's responsibility ceases, the captain having lien on the cargo for freight and any and every other claim."

October 11, 1893, libellants write their agents in Rio, making a claim against the Government of Brazil and suggesting one against the consignees (p. 94). The agents reply that there is no claim against the Government, and that they have told the captain "that he should look to his consignees to make the claim on the owners of the cargo" (*Ibid.* p. 94). His attention was thus drawn to his rights, and he should have asserted them.

Third.

Accord and Satisfaction.

It is not disputed that the consignees of the cargo, the Companhia Industrial do Brazil, settled the ship's accounts with her agents, Phipps Brothers & Co., at Rio, and paid the latter the amount shown by the account rendered, which was remitted to libellants and received without objection.

The Circuit Court of Appeals held that this settlement was not binding, and could be reopened, because the claim for demurrage was not specifically included in the settlement.

This was error.

1.—The claim was presented and discussed at Rio. The facts bearing upon it were disputed.

Edwin E. Hime was a merchant in Rio Janeiro (p. 65), and director and treasurer (*thesoureiro*, p. 92) of the Companhia Industrial do Brazil, the consignee of the vessel and cargo (p. 66).

He testifies that the *Kate Burrill* went alongside the wharf of the vendees of the lumber who had the saw mill, and that "the said owners of the saw mill had sufficient storage to stow the whole of the cargo as fast as delivered by the vessel" (p. 66). The captain made no complaint on this score (p. 66).

The captain of the vessel, Thomas Wilson, "did complain that he could not discharge the cargo as fast, or in accordance with the charter party, owing to prohibitory orders on the part of the government, there being a revolution against the government at the time, and firing in this particular locality being exceedingly heavy, and injuring life and property. This complaint was made to me, and I replied to it that I could not help him in the matter, and that he had to obey the government's orders as I had to" (p. 66). The captain made no mention of "there being no room for storing the cargo, nor that they could not get the lumber clear of the saw mill, or that they were not

selling their lumber. As far as I can recollect, there was no other vessel there " (p. 66).

Wilson, the captain, and Hime both testify that a question arose about demurrage. The captain testifies in substance as follows :

I made no claim upon the consignees of the cargo for demurrage. I did tell them that I intended to claim demurrage. "They said on account of the revolution I couldn't claim any demurrage." I had nothing to do with the collection of freight. That was collected by Phipps Brothers & Co. (p. 77). I spoke to Phipps Brothers & Co., the agents of the ship, sometimes, as to how the ship was discharging. "I said that the ship ought to get demurrage for detaining her so long in port after her lay days were up." I said that to the manager in Phipps' office. He made no reply (p. 79).

"As soon as our lay days were up I went to the consignees and told them they would have to pay demurrage, and they said we couldn't claim any demurrage on account of the revolution" (p. 79). I furnished no information to Phipps & Co. to enable them to send their account to the assignees of the cargo (p. 79-80). I knew that our charter party called for demurrage, so much a day, day by day (p. 80). I said to Phipps Brothers, 'The consignees ought to pay the demurrage for detaining the vessel so long.' They said they didn't know" (p. 80).

William Burrill, one of the libellants, and one of the owners of the *Kate Burrill*, was called as a witness. He does not deny that Phipps Brothers & Co. were agents for the ship in Rio Janeiro, or that they collected and remitted to him the freight less the charges. He writes them October 11, 1893, the following very significant letter (p. 94) :

"We presume the delay and extra cost of provisions and labor, &c., will be a very serious additional expense for which the Government of Brazil should be liable, in which case we hope you will claim for us the utmost dollar. We note by the C/Party that there is no exception clause covering

these occurrences, and it's just possible the consignees' cargo are liable."

The answer to this is dated November 17, 1893, eleven days before the discharge of the cargo was completed (p. 91,) and makes the following statement (p. 94):

"Since writing on 16th ulto. we are in receipt of your favor of 11th idem.

"There is absolutely no claim against the Government that could be made good for loss occasioned by delays, &c., in consequence of the present revolutionary troubles, and every branch of trade is suffering severely without any prospect of redress.

"We saw Captain Wilson a day or two ago when he told us he had still about 2,000 pcs. on board and waiting for his consignees to take them away. It is, we understand, most difficult to get labor, and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times, but have told him that he should look to his consignees to make the claim on the owners of the cargo."

II.—Phipps Brothers & Co. notified the Companhia "that they were not to give the captain any money, and that the accounts of the vessel had to be liquidated with them (Mess. P. Bro. & Co.) and not with the captain" (p. 66).

It is further proved by Hime that an account was rendered by him to Phipps Brothers & Co. for the amount due under the charter party, and that the amount shown by it to be due was paid and received in full settlement of all claims under the charter party (p. 67).

The account rendered by the consignee to Phipps Brothers & Co. is at page 69, and is marked Exhibit A. It is a duplicate of the account received from them by the libellant Burrill (p. 81), which is marked Libellant's Exhibit 3 (p. 92). He also received an account current from them, showing

their collections and remittances on account of the *Kate Burrill* (p. 81 ; Ex. 4, p. 93).

These facts show that Phipps Brothers & Co. were the general agents in Rio Janeiro for the libellants in all matters relating to the *Kate Burrill*. The rule applicable to such a case is well settled.

1 Am. and Eng. Encyclopædia of Law, 2nd Ed., p. 1022.

"A general agent for the management of the business of the principal has an authority coextensive in scope with the business. He must necessarily possess and exercise the same power and authority that his principal could if present."

This proposition is abundantly sustained by authority.

Watteau *vs.* Fenwick, 1 Q. B. (1893), 346.

Hubbard *vs.* Ten Broeck, 124 Pa., 291.

Cummings *vs.* Sergeant, 9 Metc. (Mass), 172.

Bergenthal *vs.* Fiebrantz, 48 Wis., 435.

The same rule was applied to contracts made by the cashier of a bank in

Minor *vs.* Mechanics' Bank, 1 Pet., 46.
Bridenbecker *vs.* Lovel, 32 Barb., 9.

The question is whether what the agent did was "in the course of his employment;" not whether it was specifically authorized.

New Orleans Co. *vs.* Hanning, 15 Wall., 649.

Baltimore Trust Co. *vs.* Hambleton, 40 Lawy. Rep. Ann., 317, 238.

The position of a general agent is certainly not inferior to that of a master in a foreign port. The rule as to his authority is well stated by Kay,

Law of Shippers and Seamen, Sec. 400, p. 283 (2d Ed.):

"He has authority in a foreign port to settle accounts for freight, demurrage and delay and all such matters."

To the same effect are

The Edward H. Blake, 63 U. S. App. 507, 92 Fed., 202.
Alexander *vs.* Dowie, 1 Hurlst. & N., 152.

Baron MARTIN (p. 156):

"WILLES, J., on the trial held that of necessity the captain had authority to settle all such matters (lay-days and demurrage), and that business could not be carried on unless the captain's agreement under such circumstances was binding. I concur with him in thinking that the captain must necessarily have authority to make such settlements, otherwise persons having to make payments abroad would be placed under insuperable difficulties."

In the case at bar the question is whether an agent, charged with the general management of a ship's business, and amongst other things to collect the amount due under the charter party, is authorized to liquidate this amount. If such an agent is not authorized to make such liquidation it is obvious that this can be made only by the express authority of the principal. As pointed out by Baron Martin such a rule would place persons having to make payments abroad under insuperable difficulties.

III. —One reason for the rule on this subject is the injustice that would be done to parties dealing with the shipper, if there was no one present who could settle controversies relating to her voyage.

In the present case the charter party gives the vessel "an absolute lien upon the cargo for all freight, dead freight, and demurrage" (p. 6). The

Circuit Court of Appeals has held that the bill of lading is not as extensive as the charter; that under its terms there would be a lien only for demurrage caused by the actual neglect of the consignee (p. 56), and that under the charter, *vis major* at Rio Janeiro was no defense to the claim for demurrage (p. 58). The learned District Judge held otherwise. Certainly a question upon which learned Judges have differed was debatable, and therefore a fair one for settlement.

Moreover, according to the captain's testimony, the failure to discharge the cargo in time was, in fact, caused by the neglect of the vendee of the lumber to whom the consignee directed him to make delivery (p. 74). He says as to the negligence of the consignees' agent:

"There wasn't enough water to get into the dock" (p. 74). I made objection to the slowness of the discharge of the cargo to the consignees. "They told me as soon as that other vessel got out, they would take the cargo out as fast as we could discharge her." I was ready and able to discharge the cargo faster than the consignees received it. "They hadn't warehouse room to put the cargo away from the ship." The wharf "was pretty well piled up with lumber by the sawmill." I complained again to the consignees respecting the suspension of the discharge of the cargo. "They said there was no room to put the lumber away on account of the trouble. They couldn't get the lumber clear of the sawmill. They were not selling their lumber. When the other vessel was there the place was filled up. There was no place to put it" (p. 75).

If this testimony is true, it is plain that the captain could have enforced his lien upon the cargo for demurrage. If such lien had been enforced, there is no reason to doubt that he would have compelled a settlement. In any case no attempt was made to enforce the lien for demurrage. Instead of this, the ship's agents presented an account which was paid in full, and the ship went away.

There was laches on the part of the captain and ship's agents in the failure, under the circumstances, to claim and enforce a lien, and they ought not now to be allowed to enforce the present demand against innocent consignors.

Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96.

If the libellants or their agents had acted promptly, as above shown, it is altogether probable that the respondents would have had some remedy against the consignees, which is now lost.

Penn Mutual Co. *vs.* Austin, 168 U. S., 685, 698.

IV.—The libellants accepted the remittance from Phipps Brothers & Co. without objection, and so far as appears, have never repudiated it in any way. When this payment was received by the libellants they received a copy of the statement rendered by the consignees (p. 81). The correspondence at page 94 shows that libellants then had full information as to the facts. Under these circumstances their receiving the remittance without objection was a ratification of whatever their agents had done.

Palmerton *vs.* Huxford, 4 Denio, 166.

V.—The amount due in Rio Janeiro under the Charter Party, was unliquidated. It was uncertain whether there was a valid claim for demurrage, and if any, for how many days it was payable. It was uncertain as to what charges could properly be deducted from this amount. The claims on both sides are therefore unliquidated.

Nassoiy *vs.* Tomlinson, 148 N. Y.) 326.

Where this is the case, the acceptance of a smaller amount than that actually due in satisfac-

tion of the whole amount due, is a good accord and satisfaction.

Bofinger *vs.* Tuyes, 120 U. S., 198.
United States *vs.* Child, 12 Wall, 232.
Fuller *vs.* Kemp, 138 N. Y., 231.

In the latter case the party receiving the check kept it, but wrote that he accepted it as part payment only. The maker thereupon notified him that the check was sent as payment in full. It was held that under these circumstances the protest was unavailing to the payee, and that his using the check amounted to an accord and satisfaction.

To the same effect is Davenport *vs.* Wheeler, 7 Cowen, 231.

In this case the Court say:

" Having violated the contract (suppose on both sides) the matter rested in compromise. * * * The debt was unliquidated in its nature, but by the acts of the parties it was liquidated and paid. They ought not afterwards to be allowed to go into evidence upon it.

Fourth.

Account Stated.

When the business in Rio Janeiro was concluded an account was rendered to Phipps Brothers & Co. for the amount due the ship. This account was accepted by them and no objection appears to have been taken to it before the filing of the libel. The libel itself does not contain any allegations apt to satisfy the Court that this account stated should be opened. There is no allegation of fraud or mistake. Under these circumstances the account stated should not be opened. Not being opened, it is a final settlement of all matters in difference under the charter party.

There is some confusion in the cases owing to the failure to discriminate between an account stated, as evidence of a balance, to recover which suit is brought, and an account stated as a defense to a suit. It is often said in reference to the first class of cases that the account can be opened for fraud or mistake. But no authority has been found in which, where an account has been stated, and a balance appearing to be due has been paid in full, the party receiving the payment has been allowed to open the settlement thus effected, upon proof that an item which ought to have been included in the account was not included in it, or that upon a proper construction of the contract he was entitled to more than was allowed him by the account.

Laycock, *vs.* Pickles, 4 Best & S., 497.

In this case Mr. Justice BLACKBURN thus states the rule (p. 506):

"The stating of the accounts itself was a sufficient consideration to support this action. * * * It is not necessary in order to make out a real account stated that the debts should be debts *in presenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had really been paid down on each side; and the balance is recoverable as if money had really been taken in satisfaction; subject to this, that where some of the items are such that if they had been actually paid, the party paying them would have been able to have recovered them back as on a failure of consideration, the account stated would be invalidated."

It cannot be contended that the claim for demurrage was not included in the settlement. It has been already shown that the validity of this claim was fully discussed at Rio Janeiro between the various parties. The facts were well known to them all. There can, therefore, be no ground for

claiming mistake under such circumstances. The account will not be opened.

Wilson *vs.* Frisbee, 57 Ga., 269.
Quinlan *vs.* Keiser, 66 Mo., 603.
Linville *vs.* State, 130 Ind., 210.

In the case cited by the Circuit Court of Appeals (Perkins *vs.* Hart. 11 Wheat., 237), the items sued for arose outside the contract, respecting which the settlement had been made. In the case at bar they are claimed under that contract.

Fifth.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed, with costs.

EVERETT P. WHEELER,
Advocate for Petitioners.

No. 187, 26

Reply Brf. of Wheeler for C

Office Supreme Court U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 14, 1900.

No. 187.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN,
PETITIONERS,

vs.

WILLIAM BURRILL ET AL.

REPLY FOR PETITIONERS.

FIRST.

The counsel for Burrill *et al.* (libellants below) treat the case as if it came here solely on the exceptions to the fourteenth, fifteenth, and sixteenth articles of the answer. They overlook the fact that they have a decree which, if sustained at all, must be sustained upon the evidence. This varies in important particulars from the allegations of the articles excepted to. Such is often the case.

1. The fourteenth article of the answer is silent as to all the facts anterior to the shipment. Even if the exception to it, as it stands, is well taken, the consequence does not follow that libellants are entitled to judgment on the issues

joined by the other articles of the answer which were not excepted to.

2. The evidence on these issues shows clearly the following facts:

(*a.*) The cargo of lumber was bought and paid for by the Companhia Industrial before it was shipped or the bill of lading was issued (pp. 12, 13, 20, 21, 26, 27).

(*b.*) The bill of lading was used solely as collateral to secure a draft drawn for the purchase-money, which was paid in due course (pp. 14, 15, 17).

(*c.*) The vendee (The Companhia Industrial) knew of the charter-party, recognized that its provisions as to demurrage were binding on it, but claimed that there was no liability for demurrage, because the delay was caused by revolutionary violence (pp. 66, 67).

(*d.*) The captain claimed that the delay was caused by the negligence or fault of the second vendee, the Berrogam sawmill (pp. 66, 74, 79, 80).

(*e.*) The captain delivered the lumber without insisting on his lien. The agents for libellants (Phipps Bros. & Co.) allowed this to be done and took no steps to enforce the lien (pp. 80, 94).

(*f.*) The charterers were without fault. They had no control either over the discharging or receiving the lumber.

SECOND.

On these facts the law is:

1. The lien created by the charter-party remained, notwithstanding the omission of the bill of lading to express the lien, because there was no *bona fide* purchaser for value

who could claim exemption from the lien created by the charter.

Principal Brief, second point, pp. 14–20.

2. Whether the vendees were liable *in personam* for the demurrage is immaterial. The cases cited on that point are irrelevant. The question was of lien and of the captain's right to refuse delivery of the cargo until he was paid demurrage.

3. If the captain's testimony is true that the delay was caused by the fault of the vendee, the captain had a lien for damages for detention in the nature of demurrage, even if there were no claim for demurrage under the express agreement.

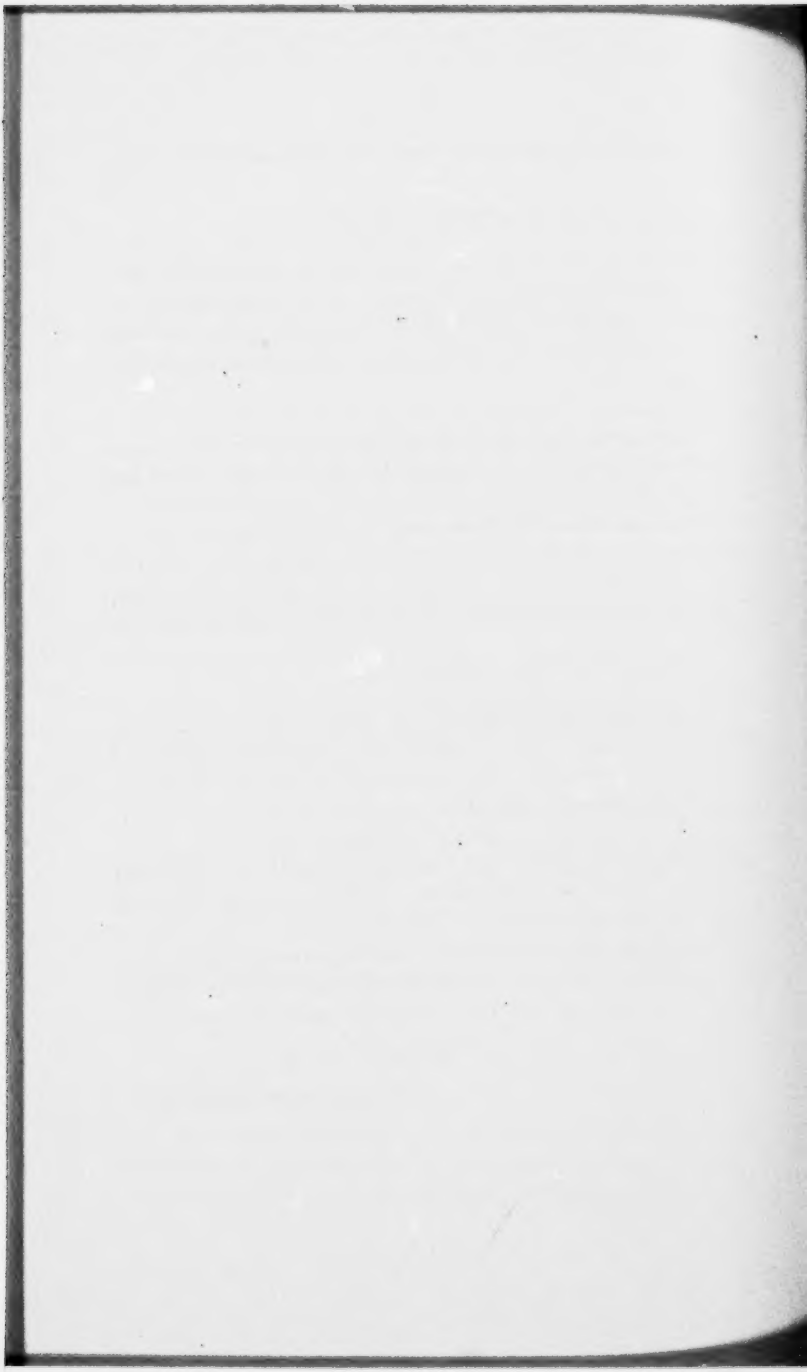
4. The captain waived the lien by surrendering the lumber.

Bags of Linseed, 1 Black, 108.

5. The cesser clause applies and releases the charterer by its express terms. The exception held by some authorities to be implied when lien for demurrage is released does not apply to the facts of this case.

6. Even if this were otherwise, the liability of charterers was like that of sureties, so far as demurrage at the port of discharge was concerned. Their liability, if any, was for the fault or omission of another. The captain therefore owed them a duty to enforce the lien. Having failed to do this, and in fact released the lien, he discharged the charterers.

EVERETT P. WHEELER,
Of Counsel for Petitioners.



No. 625

Supreme Court of the United States

October Term 1898.

Brief of Kneeland for

GEORGE W. CROSSMAN, *et al.*,

Respondents and Petitioners,

Filed Jan. 16, 1899.

versus

WILLIAM BURRILL, *et al.*,

Libellants.

Brief for Libellants in opposition to Petition for Writ of Certiorari.

LAWRENCE KNEELAND,

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John Polhemus Printing Company, Printers and Mf'g. Stationers, 121 Fulton Street, N. Y.

Supreme Court of the United States

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Respondents and Petitioners,

vs.

WILLIAM BURRILL *et al.*, Owners of the Bark "Kate Burrill,"
Libellants.

Brief for Libellants in Opposition to Petition for Writ of Certiorari.

The Circuit Court of Appeals for the Second Circuit has directed the District Court to decree in favor of libellants for fifty-three days demurrage, at the charter rate of $59.46 per day, amounting to $3,151.

The facts, concerning which there is no dispute, are as follows:

In March, 1893, the libellants, owners of the bark *Kate Burrill*, chartered that vessel to the respondents by written charter-party, to carry a full cargo of pitch pine lumber from Pensacola to Rio de Janeiro, at an agreed rate of freight.

The charter-party contained the following provisions:

(1) "The cargo to be furnished at port of loading "at the average rate of not less than 20,000 super-

"ficial feet per running day, Sundays excepted, "and to be discharged at port of destination at "the average rate of not less than 20,000 superficial "feet per running day, Sundays excepted. Lay "days to commence from the time the vessel is "ready to receive or discharge cargo, and written "notice thereof is given to the party of the second "part (respondent) or agent; and for each and "every day's detention by default of the said party "of the second part, or agent, $59.46 in U. S. gold "(or its equivalent), per day, day by day, shall be "paid by said party of the second part, or agent, "to the said party of the first part, or agent."

(2) "Vessel to discharge at safe anchorage ground "in Rio Bay, designated by charterers."

(3) "The bills of lading to be signed as presented "without prejudice to this charter."

(4) "Vessel to have an absolute lien upon the cargo "for all freight, dead freight and demurrage. "Charterers' responsibility to cease when the vessel "is loaded and bills of lading are signed."

(5) "The vessel to be consigned to charterers' "agents at port of discharge, inwards only, paying "them a consignment commission," etc.

The bill of lading presented by the charterers to the master and signed by him shows the shipment by the charterers "to be delivered * * * at the "aforesaid port of Rio de Janeiro unto order or "their assigns, *they paying freight for the said "lumber as per charter party.*"

The bills of lading were assigned by the respondents to Companhia Industrial do Brazil, who were also the respondents' agents, to whom the vessel was consigned under the charter-party, and the bills of lading were assigned by the latter to Manoel da Cruz y Filho, purchasers of the lumber.

The vessel arrived at Rio on August 30, 1893,

where she delivered 514,256 feet of lumber. On September 4th, 1893, written notice that the vessel was ready to discharge her cargo was given by the master to the respondents' agents, who thereupon designated an anchorage, and on the following day, September 5th, the vessel hauled to said anchorage, and on the 6th September commenced the discharge of her cargo. The lay days for discharging at the rate of 20,000 superficial feet per day, excepting Sundays, expired on October 6th, but the vessel was detained until November 28th, a further period of 53 days, for which time the libellants have been awarded demurrage at the charter rate.

After completion of the discharge, the respondents' agents made up a written statement of the freight due the vessel under the charter-party, and presented the same to the libellants' agents and paid to the latter the balance shown to be due by such statement. The balance shown due by this statement and paid to the respondents' agents was the exact amount due for freight under the charter-party less disbursements and a prior payment on account.

The respondents set up as defences:

1. The "cesser clause" contained in the charter-party—"Charterer's responsibility to cease when the vessel is loaded and bills of lading signed."

2. That the libellants were prevented from discharging the cargo and respondents were prevented from receiving same sooner than they did, by reason of acts of the public enemy, namely, the state of hostilities existing at Rio by reason of the pending revolution.

3. That the payment to and receipt by the libellant's agents of the balance due for freight under charter-party was accepted and received in full satisfaction of all claims and demands under the charter party.

Exceptions to these defences, as insufficient in law, were filed in the District Court and the case was heard upon such exceptions. The District Court sustained the exception to the defence of the "cesser clause" in the charter party, but overruled the exception to the second defence upon the ground that the libel did not allege the actual readiness of the vessel to discharge, but only that notice of such readiness was given. Application to amend the libel was denied and a decree dismissing the libel entered, from which appeal was taken by libellants to the Circuit Court of Appeals.

Amendment to the libel was permitted by that Court and the libel was accordingly amended, alleging actual readiness on the part of the vessel to discharge and that the discharge was actually commenced on the 6th day of September, 1893. The same defences were interposed in the answer to the amended libel and exceptions to the sufficiency of the same again filed. The Circuit Court of Appeals sustained the exceptions to both the first and second defences, and testimony was then taken concerning the circumstances connected with the payment of the balance of the freight to the agents of the libellants at Rio. Upon final hearing the Circuit Court of Appeals determined that the defence of account stated and accord and satisfaction of all claims under the charter party was not sustained.

The libellants call attention to the following considerations:

FIRST.—The petition of the respondents does not assert or claim, nor do the facts recited therein show that this case is one "of peculiar gravity or general importance," or that the exercise of the jurisdiction of this Court is necessary "to secure uniformity of decision."

American Construction Co. v. *Jacksonville Railway*, 148 U. S., 372, 383.

SECOND.—Both the District Court and the Circuit Court of Appeals have concurred in the finding that the "cesser clause," contained in the charter party, did not relieve the respondents from liability, in view of the fact that they required the master to sign bills of lading, which did not bind the consignee of the cargo to *pay demurrage as per charter party.* Such finding is in conformity with the decisions of the courts of this country and England, as appears from the authorities cited in the opinions, to which may be added the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Schmidt* v. *Keyser*, 88 F. R., 799.

THIRD.—There is no real conflict between the opinions of the District Court and the Circuit Court of Appeals upon the sufficiency of the defence pleaded, that the delay in discharging the cargo was due to the act of the public enemy. The only exceptions contained in the charter party are "dangers of the seas, fires and navigation."

The decision of the learned District Judge was based upon the fact that the original libel did not allege actual readiness on the part of the vessel or the designation of a safe anchorage. This omission was remedied by amendment. The amended libel alleged not only readiness on the part of the vessel and the designation of a safe anchorage by respondents' agent, but also the actual commencement of the discharge of the cargo, all of which allegations were fully established by the evidence.

The time for discharge of the cargo was fixed by the charter party, and the authorities are unanimous in holding, that, in such cases, the charterer takes the risk of all unforseen circumstances. In addition to the authorities cited by Judge Wallace in his opinion we call attention to the later decision of the Circuit Court of Appeals for the Eighth Circuit in *Empire Transportation Co.* v. *Philadelphia & R. Coal & Iron Co.*, 77 F. R., 919.

FOURTH.—The question of the effect of the payment made to the libellants' agent at Rio is fully disposed of by the opinion of the Circuit Court of Appeals on the final hearing.

FIFTH.—The questions involved are more elaborately considered in the briefs of the libellants' counsel in the Circuit Court of Appeals hereto appended.

It is respectfully submitted that the petition of the respondents should be denied.

January, 1899.

LAWRENCE KNEELAND,
Advocate for Libellants.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WILLIAM BURRILL *et al.*

vs.

GEORGE W. CROSSMAN *et al.*

BRIEF FOR LIBELLANTS ON EXCEPTIONS TO ANSWER.

The First Exception.

The 11th Article of the libel alleges "that the total freight "on the cargo at the charter rate was £1,390 6s. 5d.; that "the Companhia Industrial do Brazil, the agent of respondent "made up an account of the amount due on said cargo as "per charter-party, charging for 466,862 feet at $13.50 per 1,000 "feet, and for 47,394 feet at $13.50 less ¼, the said two items "amounting to $6,729.17, and converted the same into pounds "sterling at the rate of $4.84 to the pound, amounting to "£1,390 6s. 5d., and credited themselves with £875 paid on "account, leaving as the balance due for the said freight the "sum £515 6s. 5d., which sum on or about the 7th day of "December the said Companhia Industrial do Brazil paid "Phipps Bros. & Co., to whom they had previously paid the "sum of £875 in advance. There was no other account or pay- "ments made for the freight on said vessel and *no amount "paid for demurrage* on said vessel and no account of demur- "rage was ever stated between the said Master or the said "Phipps Bros. & Co. and the agents of the respondents."

The libellants have excepted to the 11th Article of the

Answer on the ground that the same does not answer separately each separate allegation and matter of the 11th Article of the libel, in that the same omits to answer any of the above allegations of said article; and libellants point out the 23d and 27th Admiralty Rule as being violated.

The Twenty-third Admiralty Rule among other things states: "The libel shall propound and articulate in "distinct articles the various allegations of fact upon which "the libellant relies in support of his suit, *so that the defendant* "*may be enabled to answer distinctly and separately the* "*several matters contained in each article.*"

> *Note.*—The above rule is very specific. If the libel is to be framed for a certain purpose, to wit, so that the defendant *may be enabled* to answer distinctly and separately the several matters contained in each article, it is obviously the intention that he shall do so. He is not only required to answer but to answer distinctly and *separately*, and is not only required to answer the matter contained in each article, but to make his answer distinct and separate to the *several* matters in each article.

The Twenty-seventh Admiralty Rule provides: "The answer should be full and explicit and distinct to each "*separate article* and each *separate allegation* in the libel."

It would be hard to find more precise language.

In order that there could be no mistake, the words chosen to enumerate the requirements of the answer indicate an intention to hold the pleader to the strictest precision and permit no evasion. These requirements are:

1. The answer shall be full.

2. The answer shall be explicit.

3. The answer shall be distinct (*i. e.*, separate from any other) to *each* separate article and each *separate* allegation.

In the present case the pleader has utterly failed to answer any of the matters above set forth.

In admiralty and equity a failure to answer does not constitute an admission as is the practice under the State Code.

> The Dodge Healey, 4 Wash. C.C., 656.
> Young *vs.* Grundy, 6 Cranch, 51.
> The Dictator, 30 F. R., 699.

The Second Exception.

The 14th Article of the Answer sets forth the cesser clause of the charter-party, which is annexed to the answer as is also the bill of lading, as a defence. This is excepted to on the ground that it is insufficient and so the District Judge held on sufficient authority. See his opinion, 65 F. R., 104; Apostles, 124 to 138. The grounds stated by Judge Brown in this opinion are substantially those advanced by libellant's proctor on his argument in the District Court.

The charter-party contained the following clauses:

(**1.**) "For each and every day's detention by default of the "said party of the second part or agents, $59.46 U. S. Gold or "its equivalent per day, day by day, shall be paid by the said "party of the second part (*i. e.*, the respondents), or agents, to "the said party of the second part (*i. e.*, libellants) or agents."

(**2.**) "The bills of lading to be signed as presented without "prejudice to this charter."

(**3.**) "Vessel to have an absolute lien upon the cargo for all "freight, dead freight and demurrage."

(**4.**) "*Charterers' responsibility to cease when the vessel is "loaded and bills of lading are signed.*"

(**5.**) The vessel to be consigned to charterers' agent at port of discharges, inwards only, paying them a consignment commission, etc.

The bill of lading shows the shipment by the charterers "to "be delivered * * at the aforesaid port of Rio de Janeiro "unto **order** or their assigns, **they paying freight "for the said lumber as per charter-party.**"

The 14th Article of the Answer, which is the one excepted to, states that the bills of lading were assigned to Companhia Industrial do Brazil and were then assigned to Manoel da Cruz y Filho.

The clause of the charter-party requiring the master *to sign bills of lading as presented*, has been construed in many English cases.

Hanson vs. Harold (1894), 1 Q. B., 612. Lord Esher, Master of the Rolls (p. 619), speaking of the words of the charter requiring the bill of lading to be signed "without " prejudice to the charter-party," said:

> "The meaning of these words has been settled by " decisions which cannot be questioned. The meaning as " settled by the case of Shand *vs.* Sanderson, 28 L. J. (Ex.), " 278, and Gledstanes *vs.* Allen, 12 C. B., 202, is that it is a " term of the contract between the charterers and the ship- " owners that notwithstanding any engagements made by " the bills of lading, that contract shall remain unaltered. " Therefore in this case the captain was bound to sign the " bill of lading presented to him, but his doing so was to be " 'without prejudice to the charter-party.' These words " do not limit the obligations under the charter-party to " sign the bills of lading presented to him, but when he has " done so, it does not affect the contract contained in the " charter-party. If a ship-owner puts up a ship as a general " ship, he may insist on a bill of lading in any terms he " pleases, or he may refuse to take the goods. Here the " ship-owner deprives himself of that right and agrees to " sign bills of lading as presented. Therefore the captain " was bound to sign the bill of lading as he did."

In the same case, Lord Esher quoted and adopted the language used by him, in Clink *vs.* Radford (1891), 1 Q. B., 625, as follows (page 617):

> "In my opinion the main rule to be derived from the " cases as the interpretation of the cesser-clause in a charter- " party is that the Court will construe it as inapplicable to " the particular breach complained of, if by construing it " otherwise the ship-owner would be left unprotected in " respect of that particular breach, unless the cesser-clause " is expressed in terms that prohibit such a conclusion; in " other words, it cannot be assumed that the ship-owner, " without any mercantile reason, would give up by the " cesser-clause rights which he has stipulated for in another " part of the contract," and he came to the conclusion (p. 618) that where " the provisions of the charter-party " enables the charterers to make such terms with the ship- " pers that the lien which was created is not commensurate

"with the liability of the charterers under the charter-
"party, then the cesser-clause will only apply so far as the
"lien which can be exercised by the ship-owner is commen-
"surate with such liability."

Judge Davey said, at p. 621:

"I am of opinion that it must be taken to be the fault of
"the charterers that the lien which they contracted in the
"charter-party to create or procure for the ship-owner was
"not created or procured."

It is familiar law that the endorsee of a bill of lading is liable only for the terms of the bill.

In this case, the bill required the delivery of the cargo on payment of the freight as per charter. If there had been a delay on the part of the consignee of the bill of lading in receiving the cargo, it would create a liability for damages *in the nature of* demurrage, but not at the rate specified in the charter-party, nor for the despatch provided for in the charter-party.

In re Bags of Linseed, 1 Black, 108 (1861), Chief Justice Taney said (112):

"The rights of the parties in this case depend altogether
"on the contract made in the bill of lading. That instru-
"ment does not refer to the charter-party, nor can the
"charter-party influence in any degree the decision of the
"question before us. Augustine Wills was not a party to
"it and it is not material to inquire whether he did or did
"not know of its existence and contents, for there is noth-
"ing in it to prevent Wills & Co., the sub-charterers, or
"Augustine Wills, the consignee, from entering into the
"separate and distinct contract stated in the bill of lading,
"and the assignee took the rights of Wills & Co. in this
"contract and nothing more."

The distinction between the cases where the bill of lading fixes the rate of freight by reference to the charter-party, and the cases where "all other conditions of the charter-party" are incorporated into the bill of lading is a well recognized one.

Thesiger, *J.*, says, in *Porteous* v. *Watney* (1878), L. R., 3 Q. B. D., 534, at page 537:

"The cases of Chappelle *v.* Comfort, 10 Q. B. (N. S.), "802; Fry *v.* Chartered Bank of India, L. R., 1 C. P., 698, "and Smith *v.* Sieveking, 4 E. & B., 945; 5 E. & B., 589, "which have been cited on behalf of the defendants in the "present case, so far from weakening the authority of "Wegener *v.* Smith, 15 C. B., 285, appear to me to tend "still further to strengthen it. In each of them the "reference to the charter-party contained in the bill of lad- "ing was either expressly by the use of the words, 'freight "'as per charter-party,' as in the two first cases, or impliedly "by use of the words, 'paying for the said goods as per "'charter-party,' as in the last case, **limited** to the con- "dition in the charter-party relating to freight and was held "to be made simply for the purpose of ascertaining the "rate of freight, and not for the purpose of imposing an "obligation upon the holder of the bill to perform the con- "ditions of the charter-party generally."

The Third Exception.

The 13th Article of the answer alleges that "when said vessel "arrived at Rio the owners of the cargo used all *reasonable* dili- "gence in and about *receiving* the cargo shipped upon the said "vessel and removing the same therefrom.

"*That libellants were prevented from discharging the same* "and respondents were prevented from receiving the same any "sooner than they did, *by reason of the acts of the public* "*enemy* * * and that the detention alleged in the libel * * "was caused by said acts of the public enemy *and not* by any "default of respondents.

"That the captain * * acquiesced in the delay and recog- "nized the necessity therefor."

The exception is that the above allegations constitute no defence.

The charter-party provides:

"Cargo to be *discharged* at port of destination at the average "rate of not less than 20,000 superficial feet per running day, "Sundays excepted. Lay days to commence from the time

" the vessel is ready to receive or discharge cargo, and written " notice thereof is given to the party of the second part " (charterer) or agent, and for each and every day's detention " *by* **default** *of the said party of the second part* (charterer), " or agent, $59.46 U. S. gold per day, *day by day* shall be paid " by the said party of the second part (charterer), or agent, to " the said party of the first part (libellants), or agent.

" Vessel to discharge at a **safe** anchorage ground in Rio " Bay, *designated by charterers.*"

Points on Third Exception.

Two questions are presented:

(1) Were the respondents in *default?*

(2) Does the allegation that "libellants were prevented from " discharging the vessel by reason of the acts of the public " enemy " excuse the respondent's default?

The Safe Anchorage.

The charterers were under an *absolute* engagement to designate a **safe** anchorage at which the vessel could discharge.

Preliminary Observation. The commanding position England's commercial marine has attained is well known, and one of its causes can be traced by the student of political economy to the strict enforcement by British Courts of the terms of charter-parties, and their leaning, when there was doubt, to the shipowner's side. When her vessels are delayed in port, one of the great sources of the wealth and prosperity of the "Mistress of the Seas" is suspended. It is like stopping the machinery from producing, and every hour's delay is a national loss. Therefore, to spur the energies of the charterer and hasten the despatch of the vessel became a matter of national importance, of public policy, and for many years the greatest consideration has been given to all claims, no matter how small, of the shipping interest.

We find her most distinguished counsel engaged in cases where the amount involved would here be considered insignificant, and her Courts treating the questions raised with painstaking study and deliberation.

Thus, in Thiis *vs.* Byers, 1 Q. B. D., 244, C. Russel, Q. C., and Hershell, Q. C., were opposed, and the stake was £40. In Davies *vs.* McVeigh, 4 Ex. D., 265, C. Russel again appeared for the shipowner, who was sued for £80.

Ogden vs. Graham (1861), 1 Best & Smith, 773, 31 L. J., Q. B., 26; Carver on Car. by Sea, § 451.

Charter of ship Respigadera from Swansea with iron and coals to "*a safe port in Chili* (with leave to call at Valparaiso), or so "near thereto as she may safely get, restraints of Princes and "Rulers excepted.* 25 working days for discharging, to com- "mence from notice being given of the vessel being ready to "deliver."

The vessel arrived at Valparaiso April 2, 1850, and on April 4 the captain demanded that he receive *orders* for her port of discharge (48 hours having expired) and gave notice that lay days commenced *that day.*

He was ordered to Carrisal Bajo to discharge. That port was closed by the government of Chili, but both charterers and shipowner were ignorant of this, but the *charterers' consignee knew it when he ordered the vessel there* and that the vessel was liable to confiscation if she unloaded there without a permit. The port was closed as the district was *in rebellion*, but was *by nature a safe port* (777). The vessel lay at V. 38 days, and after the rebellion was suppressed, went under permit to C. B. and discharged. The order to discharge at C. B. was *bona fide*, as the cargo was intended for that port by the charterers. The defendants' counsel contended that *safe* meant physically safe and the rebellion being the cause of its being closed came under the exception of restraints of princes and rulers, citing Spence *vs.* Chadwick, 10 Q. B., 517.

Wightman, *J.* (779):

"Was such a port "safe" within the meaning of the "charter-party. * * *

"As C. B. was a port into which a vessel could not enter "without confiscation, it seems to me clearly not within the

* Not "mutually excepted."

"terms contemplated by the parties * * : the charterers "must pay the damages occasioned by the breach of con- "tract *in* **not naming** *a safe port*, to which they have "made themselves liable by the specific terms of the con- "tract."

Blackburn, *J.* (781):

"In the absence of all authority, I think that on the con- "struction of this charter-party, the charterers *are bound to* "*name a port*, which at the time they name it, is in such a "condition that the master can *safely* take his ship into it; "but, if a certain port be in such a state that although the "ship can readily enough, so far as natural causes are con- "cerned, sail into it, yet *by reason of political or other* "*causes, she cannot enter it without being confiscated by* "*the government of the place; that is not a safe port within* "*the meaning of the charter-party.*"

Judge Blatchford in Sleeper *vs.* Puig, 17 Blatch., 40, affirmed the District Court and in doing so, said:

"It was held by the Court below * * that a delay in "finding a place to discharge is as much within the mis- "chief sought to be obviated by the requirement of 'dis- "'patch for discharging' in the charter-party as a delay in "receiving the cargo after the vessel reaches the wharf; "and that the *respondents are liable for all delay* from the "time of the reporting of the vessel at her anchorage near "the mole in readiness to deliver her cargo."

To the same effect is Davies *vs.* McVeagh, 4 Ex. D., 269.

The Number of Lay Days was Fixed.

By the charter the number of days given to discharge the cargo is fixed by computation, *i. e.* 20,000 ft. a day, and as the cargo to unload was 514,256 ft. (see Art. 4 of Libel, admitted by Art. 4 of Ans.) it followed that 26 days was the fixed time.

Hall *vs.* Eastwick, 1 Lowell, 456.

Carver on Carriage by Sea, § 610.

"Frequently the time allowed is not definitely calculated, " but is to be that required by the 'usual despatch of the " 'port,' or 'the usual and customary time,' leaving that " to be estimated if need be; *or it may be that the cargo is to* " *be discharged* **at the rate** *of so many tons per day.*"

§ **611.** "The difference between charters in which a **spe-** " **cific time** is allowed, whether for loading or unloading, " and those in which the lay days are wholly undefined, is " thus of great importance. In the one case *the time is* " *limited* without regard to the circumstances under which, " when the time arrives, the contract has, in fact, to be " performed. * * .

" When the time is definitely fixed, or is described so as " to be calculable beforehand there is an *absolute* obligation " on the charterer to have the work completed within that " period, whatever circumstances occur. He is answerable " although the completion may have become *impossible* " owing to causes which have arisen without any fault or " omission on his part. Thus he bears the risk of delay " arising from the crowded state of the place at which the " ship is to load or discharge (Randall *vs.* Lynch, 2 Camp., " 352), or from frost (Barrett *vs.* Dulton, 4 Camp., 333), or " bad weather (Thiis *vs.* Byers, 1 Q. B. D., 244), prevent- " ing access to the vessel; or from acts of the Government " of the place prohibiting export, or preventing communi- " cation with the ship (Parker *vs.* Hodgson, 3 M. & S., 267; " Blight *vs.* Page, 3 B. & P., 295, n.).

" *And it is immaterial that the shipowner also is* **pre-** " **vented** *from doing his part of the work within the* " *agreed time;* unless he is in fault. *The charterer takes* " *the risk.*"

Carver on Carriage by Sea, § 608.

" The undertaking as to the time which the loading or " discharge shall occupy *is given by the freighter, not by* " *the shipowner.* * * The promise is made by the " freighter *for the benefit of the shipowner.*"

Davis vs. Wallace, 3 Clifford, 131, Clifford, *J.*

"The settled rule is that where the contract of affreight-
"ment expressly stipulates that a given number of days
"shall be allowed for the discharge of the cargo, *that*
"*such a limitation is an express stipulation that the*
"*vessel shall in no event be detained longer for that pur-*
"*pose*, and that if so detained it shall be considered as the
"delay of the freighter, *even where it was not occasioned by*
"*his fault, but was inevitable.* Where the contract is that
"the ship shall be unladen within a certain number of days,
"it is no defence to an action for demurrage that the over
"delay was occasioned by the crowded state of the docks
"or by port regulations, or government restraints. *Deten-*
"*tion* of the vessel for loading or discharging longer than
"the time allowed by the contract entitles the owner to the
"stipulated demurrage, although it was *impossible* to com-
"plete the work within that time by natural causes.
"Randall *vs.* Lynch, 2 Camp., 352; Barrett *vs.* Dutton, 4
"Camp., 233; Hill *vs.* Idle, 4 Camp., 327; Furnell *vs.*
"Thomas, 5 Bing., 188.

A Review of the English Cases.

Cargo ex Argos (1872), 5 P. C., 161. Sir Montague E. Smith.

"The *agreement to pay demurrage after 24 hours* clearly
"implies that the parties contemplated that the ship might
"be *detained* by his **default** to '*take out*' the goods
"and that it was not intended the master should land or
"take the risk of landing them. The prohibition to land
"the petroleum therefore did not prevent the plaintiff (ship
"owner) from fulfilling his part of the contract."

"In Waugh *vs.* Morris (L. R., 8 Q. B., 202), the plaintiff
"recovered for the detention of his ship although *it was not*
"*possible to land the hay* anywhere in the port of London.
"The contract of the shipper in that case does not in their
"Lordships view substantially differ from the defendants in the
"present."

Cites Ford *vs.* Cotesworth, L. R., 4 Q. B., 127, *id.*, 5 Q. B., 544 and points out difference.

Thiis vs. Byers (1876), 1 Q. B. D., 244.

On the trial before Gove, J., it appeared that deft. chartered plffs. vessel for a voyage from Pensacola to a port in Untited Kingdom. In charter was the clause, "16 working days to be "allowed the said merchants for loading at P. and *to be dis-* "*charged at such wharf or dock as charterers may direct,* "*always afloat in 14 like days.*"

Vessel was ordered to Middleborough and arrived at the usual place of discharge in river Tees and began discharging. "It "was the masters duty, by the practice of the port to put the "timber over the ships side *and form it into rafts*, and the "consignee then sent steam tugs to carry it away. *After the* "*discharging had begun rough weather came on, during which* "*the master though ready was unable to put the timber over* "*the side and form it into rafts*, and consequenly it was not "possible for the charterers to take any timber away, though "the ship remained at her anchorage, *and the tugs could have* "*towed the timber away if it could have been formed into rafts.* "The unloading was thus delayed owing to the rough weather "four days."

A verdict was taken for the plaintiff which included £40 for demurrage and leave was given to move to reduce the verdict by £40 if the Court should be of the opinion that by the *true construction* of the charter deft. was not responsible for the delay occassioned by the bad weather.

C. Russell, Q. C., moved:

"The deft. is not liable for the *delay* in unloading the "ship where the unloading, as here is the *common employ-* "*ment* of the ship and freighter. It was the duty of the "ship to discharge the timber over the side and form it into "rafts, and then the defendant to send tugs and take it "away. The *default was in the ship* for if the rafts had "been formed the tugs could have towed it away. The "unloading being the *common employment* of both parties "neither is liable for delay caused by *vis major*. Ford *vs.* "Cotesworth, L. R., 4 Q. B., 127; L. R., 5 Q. B, 544. "Herschell, Q. C., for plff. pointed out (248) that as the "master and crew were *ready and waiting*, the delay was "not theirs."

The judgment of the Court (Blackburn & Lush, *JJ.*, was delivered by Lush, *J.* (249):

"*We took time to look into the authorities,*"

Nota Bene. The Court forecloses any idea of hasty conclusions and consequent bad law.

"and are of opinion that *where a given number of days* is "allowed to the charterer for unloading, *a contract is im-* "*plied* on his part, that, from the time the ship is at the "usual place of discharge *he will take the risk* of any ordi- "nary vicisitudes which may occur to prevent him from "releasing the ship at the expiration of the lay days. This "is the doctrine laid down by Lord Eilenborough in Ran- "dall *vs.* Lynch, 2 Camp., 355, which was upheld by this "Court and it has been accepted as the guiding principle "ever since: See Leer *vs.* Yates, 3 Taunt., 387; Harper "*vs.* McCarthy, 2 B. and P. (N. R.), 267; Brown *vs.* John- "son 10 M. and W. 331, and the other cases cited in the "argument."

Davies vs. McVeagh (1879), 4 Ex. Div., 265, Crt. of Ap. Charter: "Vessel to load in B. M. Dock or W. Dock. Vessel next day after charter was, as a matter of favor, admitted into W. Dock, but owing to regulations of dock authorities did not begin to load till 14 days later.

Charter gave 19 running days to load and discharge. Delay occurred in discharging, so that 20 days elapsed after the 19 running days—if calculated from the time of admission to dock.

Plff. paid £80, *i. e.*, £4 a day for 20 days, under protest, and sued to recover it back. Held, the action would not lie.

C. Russell for defendant claimed Thiis *vs.* Byers, 1 Q. B. D. 244, applied.

Bramwell, *J.*

"When a ship is to take on a cargo at a specified place "of loading the responsibility rests, not with the owner, "but with the charteres, if the specified berth *is not in a* "*fit state* to receive her upon her arrival at the appointed "time * * * I think it may be laid down that a vessel "has reached the *place of loading* as distinguished from "the spot of loading when she has entered the port from "where her voyage is to commence.

Postlethwaite vs. Freeland, 5 Ap. C., 617.

Blackburn, *J.*

"As the merchant, if not himself resident at the port of "discharge, at all events has a consignee and correspondent "there resident, he presumably knows all about the means "and appliances for discharging a ship there, better than "the shipowner. *It, therefore, seems very reasonable that "the shipowner in making his bargain should require the "merchant to make an estimate of the probable time of dis-"charging the ship, and take on himself the risk of that "time being exceeded*; and then the shipowner can fix the "payment he is willing to take with reference to this, and "this has long been done by providing lay days and de-"murrage days for discharging. In the last edition of "Abbott on Shipping, published while Lord Tenterden "was living, it was said (5 ed., 180) * * * 'And where "'the time is thus expressly ascertained and limited by the "'terms of the contract, the merchant will be liable to an "'action for damages, if the thing be not done within the "'time, although this may not be attributable to any fault "'or omission on his part, *for he has engaged that it shall "'be done.*'

"These last words are put in italics by Lord Tenterden. "It still remains the more usual form of charter-party to "insert lay days and demurrage days.

"In many of the cases cited on the argument at the bar "the charter-parties were of this nature, and the question "only was whether the lay days had begun to run. Tap-"scott *vs.* Balfour, L. R., 8 C. P., 46, was of this nature, "for though the charter-party did not name a specific "number of days, it provided that the ship was 'to be "'loaded by the defendants **at the rate of 100 tons "'per working day**,' and as the burden of the ship "was known and *id certum est quod certum reddi potest*, "this was equivalent to naming a certain number of days."

Leer vs. Yates (1811), 3 Taunt., 387, Mansfield, *C. J.* Goods under other cargo could not be discharged within the lay days. Held, cargo owners liable for damages.

"But it is not in truth the fault of either the plaintiff or "defendant that the goods could not be taken out."

Porteous vs. Watney; **Straker vs. Kidd** (1878) 3 Q. B. D., 226, Lush, *J.*

"Now, the only thing which prevented the delivery in "the present case was the inability of the master *to get at* "*the goods* because they were stowed at the bottom of the "hold, and because the owners of the super-incumbent "goods had neglected to take those goods away in proper "time. Can this neglect of the other consignees be said to "be the **default** of the master? If not, it is immaterial "whose fault it was, *for the defendants undertook that* "*whether they were able to get away their goods or not, they* "*would pay demurrage if the ship was not cleared within* "*the stipulated period*, the contract being as I have said an "**absolute,** and not a conditional contract. Now, it is "clear that the master was not in **default.** *He was ready* "*and anxious to deliver.*"

S. C., 3 Q. B. D., 534. Affd. by Court of App. Theisinger, Cotton and Brett, *JJ.*

Brett, J. (543).

"The defendant is to pay unless it is the **fault** of the "ship owner."

Randall vs. Lynch (1810), 2 Camp., 352, Ld. Ellenborough:

"The question is whether the detention of the ship, "arising from the inability of the London Dock Co. to dis- "charge her, is, in point of law, imputable to the freighter, "and *I am of opinion that a person who hires a vessel de-* "*tains her, if at the end of the stipulated time he does not* "*restore her to the owner.* He is responsible for all the "various vicisitudes which may prevent him from doing so. "* * The defendant is as much responsible for a delay "arising from the want of a berth as if it had arisen from "*tempestrous weather*, or any other cause."

Barker vs. Hodgson (1814), 3 Maule & Selwyn, 267: In consequence of an *infectious disorder* at Gibraltar, all intercourse with ships was prohibited and deft. could not load a cargo on brig Providence within the 60 running days allowed by the charter. Lord Ellenborough, *C. J.:*

"Is not the freighter the adventurer *who chalks out the* "*voyage* and is to furnish at all events the subject matter "out of which freight is to accrue? * * But if in con- "sequence of events which happen at a foreign port, the "freighter *is prevented* from furnishing a loading there, "the contract is neither dissolved, nor is he excused for "not performing it, but must answer in damages." Judgment for plff.

Barrett vs. Dutton (1815), 4 Camp., 333: Gibbs, *J.*, held that where a certain number of running days were allowed for loading, the freigter is liable for delay caused by the *impossibility of loading owing to ice in the river*, although the vessel could not have sailed if loaded.

Bessy vs. Evans (1815), 4 Camp., 131: 30 days for loading and unloading cargo allowed. Discharge stopped by Custom officers. Lord Ellenborough:

"At the expiration of the 30 days I think you became "liable for demurrage, although you have been *prevented* "from unloading the goods, by the wrongful act of a "stranger."

Grant vs. Coverdale, 9 P. C, 470: Charter of SS. Merrythorpe. Steamship was to proceed to Cardiff and East Bute dock and there load a cargo of iron; cargo to be supplied as fast as steamer can receive, except in case of frosts preventing the loading. The ship loaded part of her cargo. A frost set in which made a canal which communicated with the dock impassable, so that cargo ready at a wharf on the canal could not be brought in lighters to the dock. Held (Affg. Ct. of Ap.), that the frost did not "prevent the loading." Lord Selbourne says, p. 477:

"I infer from the finding of the referee, that the whole "*might have been done by carting*, though I agree that it "would have been at an expense which was preposterous "and unreasonable, if you were to look at the interest of "the charterer; but if the charterer has engaged that he "will do a certain thing he must of course pay the damage "which arises from his not doing it, whatever the cause of "his not doing it may be, whether it be his not being "willing to incur an unreasonable expense, or whether it "be any other cause."

Budgett vs. Binnington, 25 Q. B. D. 320. Plaintiffs were endorsees of a B/L for a cargo of barley shipped on S.S. Fairfield, "all conditions as per charter party," by which the cargo was to be taken *from alongside* the steamer at freighters expense and risk. *Seven running days* were allowed for unloading. B/L contained the usual exceptions, but neither it nor C/P contained any reference to strikes.

The F. arrived at Bristol and her lay days commenced Nov. 25th.

At Bristol, grain cargoes in bulk are discharged by the *joint* action of the consignee and shipowner. The consignee furnishes bags and "*bushellers*" to fill the sacks, and the shipowner hoists them to the deck and put them on scales and consignee weighs them. Different stevedores were employed by the shipowner and consignee. On Nov. 28 the laborers employed by both firms of stevedores *struck*, and no cargo was discharged until Dec. 4. The shipowner claimed demurrage and consignee paid £147 *under protest*, and sued to get it back.

The jury found that **shipowner** (deft.'s) **were not ready** *to perform their part of the discharge*, and the judge left the parties to move for judgment.

The judgment of the court (Denman, Charles and Vaughan Williams, *J. J.*) was read by V. W. (325), and at 326 he states the *contention* of plff., "that readiness and willingness of the "master to deliver the cargo to the consignee is a *condition* "*precedent* the non-existence of which, according to the finding "of the jury, disentitles the master from claiming this de-"murrage."

Or if it is not a condition precedent, "it is something which "the master has to do on his part *concurrently* with the part "which the consignee has to take in the unloading of the ship, "and therefore * * the master cannot demand perform-"ance by the consignee of his part without avering readiness "and willingness, if not a tender of performance of the *condi-"tions concurrent* due from him, which, for the purpose of "effectively making his demand on the consignee, become con-"ditions precedent."

Judge Williams says: "While approving of those conten-"tions, so far as relates to conditions precedent, *we are of the "opinion that they are not applicable to the present case, and "therefore afford no ground for holding that the master was "not entitled to claim demurrage.*"

"The fact is that the obligation of the consignee to pay de-
" murrage is '**absolute,**' as was decided in Thiis *vs.* Byers,
" 1 Q. B. D. 244." *

" *The readiness and willingness of the master to make*
" *delivery is not the consideration of or a condition precedent*
" *to the undertaking to pay demurrage for the detention of the*
" *ship*, and this being so it is not sufficient to relieve the con-
" signee of the obligation to pay demurrage, that he should
" show that the master was *unable* to perform some obligations
" undertaken by him in the charter party ; *but it must appear*
" *that the consignee was prevented* from discharging the ship
" within the time allowed for unloading *by the act of the master*,
" or those for whom *he* was responsible. If this were not so, the
" master would not have been entitled to recover demurrage in
" the cases of Thiis *vs.* Byers, 1 Q. B. D., 244 ; Porteus *vs.* Wat-
" ney, 3 Q. B. D., 227 ; Straker *vs.* Kidd, 3 Q. B. D., 223 ; for in
" each of these cases, it is plain from the facts, that *the master*
" *was not ready and willing to make delivery*, because he was
" prevented, in the one case by the weather, and in the other
" cases by the non-removal by third persons of the superincum-
" bent cargo. It is quite true that in Straker *vs.* Kidd (3 Q. B.
" D., 223) at p. 226, Lush, *J.*, speaks of '*an implied condition*
" '*that the shipowner shall be ready and willing to deliver*,"
" but his meaning is made plain by the next sentence in his
" judgment, where he says : '*If he* (the master) **wrong-**
" '**fully refuses** *to give over his goods, or if by reason of*
" '*any default of* **his**, *or for any obstacle for which* **he** *is*
" '*responsible, the consignee is unable to get his goods, this*
" '*would afford a good answer to the claim ;*" and again, after
" stating that the contract is *absolute*, and not conditional, the
" learned Judge says : '*The defendants are therefore liable,*
" '*unless they can show* that some act or *default* of the owner,
" ' or of some one for whom he is responsible, prevented them
" ' from performing their contract.' "

" In the present case the plaintiffs were not prevented from
" performing their contract by any **default** of the shipowner,
" or those for whom he was responsible. It was the action of
" the stevedores and dockers, which alike prevented the
" plaintiffs and defendants from doing their part in the unload-

* So also in Porteous *vs.* Watney, 3 Q. R. D. 226.

"ing. This in no way relieved the charterers from the *absolute* "contract to pay demurrage for the delay and detention of the "ship during unloading.

"If the strike of the stevedores had resulted from unreason- "able conduct of the master in refusing reasonable wages "asked by the stevedores, the case *might* have been different "* * *but even in such a case the charterer would, in our* "*opinion, have to show that he was* **actually prevented** "**by the default of the shipowner**; *i. e.*, that there "was no available means of performing the contract, *notwith-* "*standing the default of the* shipowner. See Alston *vs.* Her- "ring, 11 Exch., 822. If such means were available, the "charterer must avail himself of them to discharge the ship, "and take his remedy by sueing the shipowner for breach of "contract, or he will be liable to demurrage."

Judgment for defendants.

Plaintiffs appealed, 1891, Q. B., 36.

Cohen, Q. C., for plaintiff (36).

"The question is, whether the shipowner *who is in* "*default* can recover demurrage?"

Bucknill, Q. C., for defendant (4).

"The contract to pay demurrage is an *absolute* contract, "except so far as the delay may be caused by the *default* "of the shipowner or his servants."

Appeal heard by Esher M. R., Lindley and Lopes, *JJ.*

Esher M. R.: "This is a contract *by the freighter*, by "which he undertakes under certain circumstances to pay "demurrage. * * It has been held that the demurrage "contract, *where a fixed number of lay days is mentioned*, "is a contract by the freighter, that *if the ship is detained* "*over those days, he will pay demurrage for so long as the* "*ship is in such a condition that she cannot be handed* "*back for the use of the shipper* (*shipowner?*). This has "been called an *absolute* and independent contract, and it "is obvious that *a contrast* is intended to be drawn between "such a contract and a conditional one, *and that by an* **ab-** "**solute** *contract is meant an unconditional one.* The "only condition attached to it is, that the lay days shall "have commenced and run out, and that condition being "fulfilled, the obligation arises.

"*Directly the shipowner shows this state of facts, he has* "*proved his case*, and it lies on the other side to show, not "that there has been no breach of contract, but *that he is* "*excused from the performance*—in other words, his case "is one of confession and avoidance, **and the whole** "**burden of proof is on him.** * *

P. 39.

"*Of this I am certain, that if the shipowner is pre-* "*vented from carrying out his share of the discharge* "*by the acts of persons over whom he has no control,* "*the case comes within the same category as the case* "*of non-delivery caused by some physical misfortune* "*over which he has no control.* In such a case it has "been decided that he is not prevented from enforcing "the contract of the freighter — as, for instance, in the "case of prevention by weather or the acts of other con- "signees preventing a lower cargo being taken out of the "vessel. * * That reduces the matter to the question "whether there has been *default* by any persons for whom "the defendants are responsible. * * The shipowner "had no control over these workmen, and is not respons- "ible for the consequences of their acts, and consequently "there is nothing to relieve the consignee from the *absolute* "contract to pay demurrage. This is no new principle of "law but only a question whether the facts bring this case "within a recognized rule of law."

Lindley, *L., J.*:

"On whom does the risks of strikes fall in a contract "such as this, were the risk is not expressly excepted from "the risks which the freighter is to bear? The contract "was to discharge the ship, in a certain number of days. "* * The stipulation is in terms unconditional and it "has frequently been called an *absolute* contract by which "I understand an unconditional contract. * *

"It is argued that * * the shipowner shall be able "and willing to do his part in the unloading, and that if he "is not so able and willing the freighter is relieved from "the consequences of a breach on his part.

"Such a statement is far too wide; for if it were true,

" the cases of Thiis *vs.* Byers, 1 Q. B. D., 244; Porteous *vs.*
" Watney, 3 Q. B. D., 227, 534; and Stracker *vs.* Kidd,
" 3 Q. B. D., 223, would have been improperly decided."

Lopes, *J.* (41):

" There is an essential difference between the cases where
" a specific time is allowed, for loading and unloading, and
" cases where the lay days are not defined.

" In the former case the time is limited without reference
" to subsequent events. * * This is then, as I have said,
" an *absolute* contract on the part of the merchant to have
" the cargo unloaded within a specified time.

" *In such case the merchant takes the risk.* * * I can
" find no *default* in the ship. The strike was an unforeseen
" occurrence over which the ship had no control."

Ford vs. Cotesworth, Reviewed.

Carver on Carriage by Sea, § 616.

Comments on Ford *vs.* Cotesworth, L. R., 4 Q. B., 127, affd. L. R., 5 Q. B., 544. The vessel while discharging at Callao was ordered to stop discharging by the Government, out of fear of a Spanish fleet and then ordered to remove (which she did) out of cannon range.

Blackburn, *J.*, said, L. R. 4 Q. B., 133:

" The question depends upon *what the contract* **implied**
" **by law** *is*, where there is a charter party *silent as to*
" *the time* to be occupied in the discharge. * *

" Where the act to be done is one in which both parties
" to the contract are to concur and *both bind themselves* to
" the performance of it, there is no principle, on which, *in*
" *the absence of a* **stipulation** *to that effect either ex-*
" *pressed by the parties, or to be collected from what they*
" *have expressed*, the damages arising from an unforeseen
" impediment are to be cast by law on the one party more
" than on the other, and consequently we think that what
" is implied by law in such case is, not that either party

"contracts that it shall be done within either a *fixed* or a "reasonable time, but that each contract that he shall use "reasonable diligence in performing his part."

On affirming, L. R., 5 Q. B., 544, Kelley, chief baron, said:

"The delivery of the cargo at the port of destination is "one entire act, in which both parties have to perform "their parts. The defendants have to provide lighters, "and the plaintiffs to assist in putting the goods over the "side of the ship—and the plaintiffs were as much pre- "vented from doing their part as the defendants."

Carver's Comment on the above is:

"It is however, difficult to understand how the decision "in that case can have depended upon the *joint* inability "of the merchant and shipowner. Though the discharging "was a matter in which both parties had to take part, *it* "*appears that the master of the ship would have been able* "*to perform his part*, that is, the putting the goods out of "the ship into the lighters, had the lighters been there

"The disabling cause directly affected the charterers' operations only.

"Moreover, if the charterer in Ford *vs.* Cotesworth would "have been liable for the delay, but for the fact of a *joint* "inability to perform the work of discharging, **it would** "**seem that, in cases where the facts are** "**similar, he ought also to be relieved from** "**liability, although a definite time may** "**have been fixed by the contract.** But that "is clearly not the rule."

Carver, § 150.

"It has been said that the clause of exceptions in the "charter-party is introduced for the benefit of the master, "not of the merchant—Per Lord Alvanley, Towteng *vs.* "Hubbard, 3 B. & P., 298; and in Bligh *vs.* Page, 3 B. & "P., 295, n, Lord Kenyon held that the *charterer* was not "excused from providing a cargo where that had been pre- "vented by a prohibition of the Russian Government, "*though the charter excepted restraints of princes and* "*rulers during the voyage.*"

Note.—There is no "*Restraints of Princes*" clause in this charter.

By Default of Charterer.

In almost every mortgage a clause is inserted that the whole amount shall become due "*upon default*" in paying interest.

In the Statute of Frauds the word "*default*" occurs in the phrase "debt default or miscarriage."

Brown, St. of F., § 155.

"Perhaps the strictest etymological rule would be that "which was suggested by Lord Ellenborough in Castling "*vs.* Aubert, 2 East, 325, namely, that "debt" and "de-"fault" *both refer to a liability accruing upon a contract,* "but the former to such as is already incurred, the latter to "such as may be incurred at a future time."

Note.—The clause of the charter in question which reads: "And for each and every days detention by *de-*"*fault*" of the said charterer—must be read in connection with the clause, "Vessel to discharge (a continuous "act) at *safe* anchorage ground in Rio Bay *designated* "by the charterers."

Is it not clear that there was a continuous duty to designate a *safe* anchorage for each day's discharge and that a failure to do so would be a *default?*

The detention might be by the omission of the vessel—and yet the charterer be liable within the decision of Budgett *vs.* Buddington, 25 Q. B. D., 320, where Judge Williams said:

"If the strike of the stevedores had resulted from un-"reasonable conduct of the master refusing reasonable "wages asked by the stevedores, the case might have been "different * * *but even in such a case the charterer* "*would, in our opinion, have to show that he was actually* "*prevented by the default of the ship-owner, i. e.,* that "there was no available means of performing the contract "of the ship-owner. If such means were available the "charterer must avail himself of them to discharge the "ship, *and take his remedy by suing the ship-owner for* "*breach of contract,* or he will be liable to demurrage."

1,600 Tons Soda, 61 F. R., 849, C. C. of Ap., 9th C.

Charter allowed for the loading and discharging of said vessel 30 working lay days, to commence 24 hours after her

inward cargo is discharged—and for every day's detention *by default* of charterer demurrage, etc.

Vessel received instructions to load at Caleta Buena, in Chile, and while on her way there civil war broke out.

Gilbert, *J.*:

"Was the delay in loading occasioned by the *default* of "the charterers. * * In the absence of a clause limiting "the liability of the charterers to cases where the detention "shall occur from the *fault or default* of the charterers or "from some accident or cause specifically named, the obli- "gation to pay demurrage is an *absolute* one. * * But "in this case there is inserted in the demurrage clause a "limitation of the liability of the charterers in loading or "dischargiug. It is stipulated that they shall be answera- "ble only from detention which may result from their "*default.* To what extent does this provision modify "their obligation?

"There is in the use of the word '*default*' no necessary "imputation of negligence. *As used in such an instru- "ment it can mean only the non-performance of contract "duty*, a failure of one of the contracting parties to do that "which he has contracted to do."

P. 853:

"In the case of Dow *vs.* Hare (Fed. Cases No. 4037a) an "unreported decision of Judge Hoffmann in the D. C. for "the N. D. of Cal. *and affirmed on appeal* to the Circuit "Court, the charterer had chartered the ship to carry a "cargo of coal to the steamer Saranac. When the char- "tered vessel arrived at the designated port, the Saranac "was not in port. *She had been wrecked and lost at sea.* "The vessel after waiting during her lay days and for "several days thereafter, discharged her cargo on the "wharf and brought suit for demurrage. It was urged in "defence of the action that the charterers were not liable "inasmuch as the detention was not due to their '*default.*' "In delivering the opinion, the Court said: * * By the "bill of lading the Saranac was the consignee to whom the "coal was to be delivered. The consequence of her un- "punctuality ought rather to be borne by the party whose "agent she was, and who had particularly stipulated that

" she should be ready to receive the whole cargo within ten " days after the ship arrived, rather than the shipowner, " who was a stranger to the contract."

Booge vs. Cargo of Dry Boards, 42 F. R., 335. In this case the **weather** prevented the loading within the lay days and Benedict, *J.*, held this to be the *default* of the charterers, citing Thiis *vs.* Byers, 1 Q. B. D., 244. In doing so he overruled the case of **Cargo of Mary E. Taber** (1867), 1 Ben., 105, where he had construed the same word and held that the delay being caused by bad weather was not by *default* of the charterer.

The Fourth Exception.

The 16th Article of the answer alleges that " the agents of " libellants accepted from the consignee £515 6s. 5d. in full " satisfaction and payment of all claims and demands under " said charter-party and an account was made and stated " between said agent of libellants and said consignees respecting " all claims under the charter-party aforesaid and the balance " due upon said accounting was paid by the said consignee to " said agents and accepted and received by them in full satis- " faction thereof."

There is no allegation that the alleged agents (who are not named) *had authority* to accept £515 6s. 5d. in satisfaction of claims for $3,159.38 demurrage (Libel Art. 11), and $6,729.17 freight (Libel Art. 11), and the exception is to the sufficiency of the article as a defence.

If purporting to act under a power of attorney, it is obvious that the powers of the special agent would be restricted to the four corners of the paper (Dunlaps Paley's Agency, p. 201). Does it make any difference that the paper is called a charter-party. If the master can compromise demurrage, he can compromise freight, and accept one-half the rate provided, or he can enlarge the number of lay days and thus reduce the demurrage or decrease the rate of demurrage and reach the same

result. Such power he has not got, and it would be dangerous to entrust him with it. The charterers have the charter and that tells them what their contract obligations are and that they are dealing with an agent whose *duty is expressed in the paper*, viz., collect the agreed freight and demurrage.

Dunlaps Paley's Agency, p. 201: "Nor can an agent "without an express authority compound a debt."

Abbott on Shipping (12 Eng. ed.), p. 89:

"But if the owners themselves have made *a speeial con-*
"*tract* for the employment of their ship, the master cannot,
"by the general and implied authority of his character as
"master only, annul such a contract, and substitute
"another for it, with the other contracting party."

In other words, by this charter, the shipper had 26 days (by computation) to discharge in. The master could not give him 30, nor change the rate of $59.46 fixed by the charter for each day's demurrage, and if he could not do so directly, he certainly could not do so indirectly by an "accord and satisfaction."

Even an attorney-at-law has no power to compromise.

Holker *v.* Parker, 7 Cranch, 436.

Burgon *v.* **Sharpe**, 2 Campbell, 529. Action for freight and demurrage, on a memorandum for a charter: voyage from London to Buenos Ayres and back.

Lord Ellenborough:

"The captain was captain for the voyage originally
"agreed upon and on which the vessel sailed from Eng-
"land. *Everything out of that voyage was beyond the*
"*scope of his authority as captain.* As such, he had no
"power to change that voyage for another."

"The person who is intrusted with the command of a
"ship may be vested with a complete control as to her
"employment and destination; but this is superinduced
"upon his authority as captain; and to show that the cap-
"tain in this case could do away with the contract entered
"into by the owner and conclude a fresh contract binding
"on both parties, you must go farther than merely showing
"that he was captain of the ship."

Wiggins *v.* **Johnson** (1845), 14 M. & W., 609. Charter contains clause "that master of vessel and agents at Bombay "are at liberty to make such alterations in this charter-party as "they may mutually think proper."

What need of such a clause if the power existed already?

Sickens *v.* Irving (1859), 7 Com. B. (N. S.), 165.

Williams, *J.* (171):

"Now there can be no doubt that an agent appointed to "load a cargo at a foreign port has authority to do all acts "that are necessary for the performance of the contract; "and also to vary the mode of performance if any exigency "arises, provided the contract be substantially performed.

"But there is no ground for contending that he has by "law any implied authority to substitute a new contract, "to substitute one sort of commodity for another, sugar "for salt, for instance, or to appoint a different place of "loading from that contemplated by the charter-party. It "is quite new to me to hear it suggested that he has such "anthority, and I cannot but think **it would be very "mischievous** if the agent's authority could be so ex- "tended as thus to vary the contract of his principal."

Byles, *J.* (173):

"It was contended that the agent necessarily had an "implied authority to deviate from the strict letter of the "charter-party, or, in other words, that they had an "implied authority to direct the loading of a different "article in a distant port. It seems to me, however, that "the agents had no such authority in point of law."

Earl, *C. J.*:

"I think this decision is one of very considerable import- "ance, for, if Mr. Wilde had succeeded in his argument, it "might have thrown doubt upon the well known and to "the mercantile world, most **important** rule, that an "agent must be strictly limited by his authority."

Lastly. The propriety of disposing of the defences on exception is settled.

In The H. S. Pickands, 42 F. R., 239, Mr. Justice Brown, when District Judge, refused costs to a claimant because he had not excepted to the libel which was bad on its face.

April 30, 1895.

Respectfully submitted,

GEO. A. BLACK,

Proc. for Liblts.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WILLIAM BURRILL *et al.*,
Libellants and Appellants,

vs.

GEORGE W. CROSSMAN *et al.*,
Respondents and Appellees.

BRIEF FOR LIBELLANTS AND APPELLANTS.

Statement.

This cause comes on for hearing before this Court under the following circumstances:

The original libel was filed in the District Court for the Southern District of New York by the libellants, owners of the bark *Kate Burrill*, to recover from the respondents fifty three days demurrage, under a written charter-party of said vessel entered into between the libellants and respondents on March 7, 1893.

To the answer filed by the respondents the libellants filed exceptions, which were overruled by the District Judge, and an application by the libellants to withdraw said exceptions and to amend their libel having been denied, a final decree was entered in the District Court on the 16th day of January,

1895, dismissing the libel with costs (Apostles, p. 57.)

The libellants thereupon appealed to this Court from said decree, and assigned as errors, (1) the overruling of the exceptions to said answer; (2) the denial of the motion to withdraw said exceptions and amend the libel; and (3) to the dismissal of the libel (Apostles, p. 59.)

The libellants then applied to this Court for leave to amend their libel in the manner moved for in the District Court, which application was granted and an order of this Court was duly made and entered on the 18th day of March, 1895, ordering that the libellants have leave to amend their libel as moved for, that such amendments be made within ten days from the date of said order, that the respondents answer said libel and that the parties have leave to except or take evidence as they might be advised. (Order. New Proofs on Appeal, p. 9.)

On March 25, 1895, the libellants filed their amended libel in this Court. (New Proofs on Appeal, p. 11.)

On April 4, 1895, the respondents filed their answer to said amended libel. (New Proofs on Appeal, p. 16.)

On April 8th, the libellants filed exceptions to said answer. (New Proofs on Appeal, p. 23.)

The exceptions to said answer were duly brought on for hearing before this Court, and on November 11, 1895, this Court made its order declining to consider the first exception to the answer, sustaining the second and third of the exceptions, and overruling the fourth exception.

Thereupon, in pursuance of the order of this Court of March 18, 1895, the parties have proceeded to take testimony upon the issues undisposed of, and the cause now comes on for final hearing upon the amended pleadings and upon the evidence of the following witnesses:

GEORGE W. CROSSMAN, examined on behalf of the respondents in the District Court.

Thomas Wilson and William Burrill, examined on behalf of the libellants in this Court.

Edwin E. Hime, examined on behalf of the respondents, under commision to Rio de Janeiro, in this Court.

The Issues.

The amended libel alleges:

1. The ownership by the libellants of the Bark *Kate Burrill.*

Denied by the Answer.

2. The copartnership of the respondents.

Admitted by the Answer.

3. The making of the charter-party on March 7, 1893, whereby the *Kate Burrill* was chartered by the respondents for a voyage from Pensacola to Rio de Janeiro for a full cargo of pitch pine lumber, and that by said charter it was agreed as follows:

"Cargo to be furnished at port of loading at "the average rate of not less than twenty "thousand superficial feet per running day, "Sundays excepted, and to be discharged at "port of destination, at the average rate of not "less than twenty thousand superficial feet per "running day, Sundays excepted, lay days to "commence from the time the vessel is ready "to receive or discharge her cargo, and written "notice thereof is given to the party of the "second part (*i. e.*, William H. Crossman & "Brother), or agent, and for each and every "day's detention by default of the said party "of the second part (*i. e.*, William H. Cross-"man & Brother), or agent, fifty-nine dollars

"and forty-six cents, U. S. gold, or its equiva-
"lent, per day, day by day, shall be paid by
"the said party of the second part (*i.e.*, W.H.
"Crossman & Brother), or agent, to the said
"party of the first part, or agent."

Admitted by the answer, to which a copy of the charter-party is annexed.

4. That the respondents loaded the vessel at Pensacola with a cargo of 534,195 superficial feet of pitch pine lumber of which 67,333 feet were on deck, and sailed for Rio de Janeiro, where she arrived on August 30, 1893; that on the voyage 19,939 feet of deck cargo were lost by perils of the sea, and the balance, amounting to 514,256 feet, delivered at Rio de Janeiro.

Admitted by the Answer.

5. That on September 4, 1893 notice in writing that the vessel was ready to discharge her cargo, was given by the Master to the Companhia Industrial do Brazil, the agent of the respondents at Rio, who receive the cargo but who did not discharge the same at the average rate of not less than 20,000 superficial feet per running day, Sundays excepted, and did not complete the discharge within the twenty-six days, Sundays excepted, allowed for the discharge by the charter, and the demurrage therefor, at the charter rate of $59.46 per day, amounted to $3,151.38, payment of which had been demanded of respondents and refused.

Denied by the Answer, except as to the demand of payment and refusal.

7. That the charter provided: "Vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers."

Admitted by the Answer.

8. That at the time of giving notice of readiness to discharge on September 4, 1893, the vessel was in

fact ready to discharge upon charterers designating a safe anchorage.

Denied by the Answer

9. That charterers did designate an anchorage, and on September 5, 1893, the vessel hauled to such designated anchorage.

Denied by the Answer.

10. That having hauled to the anchorage designated by charterers, the vessel on September 6th commenced the discharge of her cargo, which portion was received by the charterers, the vessel lying at such designated anchorage.

Denied by the Answer.

11. The several dates on which the vessel continued the discharge of her cargo and on which discharge of cargo was suspended by charterers between September 6, 1893, and November 28, 1893, when the discharge was completed, and that during all of the times at which the discharge was suspended the vessel was ready and willing to discharge cargo.

Denied by the Answer.

12. That the total freight on the cargo amounted at charter rates to £1,390–6–5. That the Companhia Industrial do Brazil in November, 1893, made up an account of the freight due at charter rates, amounting to $6,729.17, converted same into sterling at $4.84 per £, amounting to £1,390–6–5, credited itself with £875 paid on account, leaving as a balance due for freight £515–6–5, which sum it paid on or about December 7, 1893, to Phipps Bros. & Co., to which firm it had previously paid the £875 on account. That there was no other account or payment made for freight and no amount paid for demurrage, and that no account of demurrage was ever stated between the Master or Phipps Bros. & Co., and the agents of the respondents, and that

the said sum of £515-6-5 was received in full for freight and for no other purpose.

That on December 12, 1893, the Master made protest before the British Consul against the detention of the vessel for 53 days' demurrage beyond the lay days, claiming $3,151.38, as per charter.

The Answer denies that the payment of £515-6-5 was solely in discharge of freight and avers that it was accepted in full satisfaction of all claims under the charter-party.

Denies knowledge as to the protest made by Master.

13. That neither the Master nor Phipps Bros. & Co. acquiesced in the delay, nor accepted the payment of £515-6-5 in satisfaction of all claims under the charter-party.

Denied by the Answer.

14. That neither the Master nor Phipps Bros. & Co., had authority to enter into any accord and satisfaction with charterers, nor to accept the payment made for any other purpose than as payment of freight due under charter.

Denied by the Answer.

In addition to the denials of the allegations of the libel above set forth, the respondents by their answer, plead in defense as follows:

a. By the Fourteenth Article of the Answer they plead in defense the cesser clause of the charter-party which is annexed to the Answer, as is also the bill of lading. Libellants excepted to this article of the Answer on the ground that it is insufficient in law to constitute a defense, and such exception has been sustained by this Court.

b. By the Fifteenth Article of the Answer, they plead in defence that the discharge of the cargo was prevented by reason of the "acts of the public enemy," viz: "certain vessels of war which were

"then in the Harbor of Rio Janeiro, and were "engaged in firing upon the forts in said harbor; and making war upon the government of Brazil." This defense was also excepted to as insufficient in law and the exception sustained by this Court.

c. By the Sixteenth Article of the Answer they plead an accord and satisfaction, viz:, that an account was stated between the libellants' agents and the consignee respecting all claims under the charter party and that the agents of libellants accepted and received from the consignees the sum £515-6-5 in full settlement of all claims.

This defense was also excepted to as insufficient in law, and said exception overruled.

The questions presented for decision to this Court, therefore, on this final hearing are—

(1) Whether the allegations of the libel controverted by the answer are established by the evidence.

(2) Whether the acceptance by the libellants' agents at Rio of the £515-6-5 was in settlement of all claims under the charter-party, including demurrage.

POINTS.

I.

The allegations of fact contained in the libel are fully established by the evidence.

The amended libel, in addition to the matters of fact necessary to establish a cause of action against the respondents, contains certain anticipatory allegations, bearing upon the defense of accord and satisfaction, or account stated, which had already

been interposed in the answer to the original libel (Articles XI, XII and XIII Amended Libel). These will be considered later in discussing said defense.

The testimony of the libellants' witnesses, Wilson and Burrill and of the respondents' witness, Hime, examined in this Court, fully establish the facts as alleged in the libel.

First Article of Libel:

The ownership of the *Kate Burrill* is proved by the testimony of Mr. Burrill (fol. 163, New Proofs on Appeal).

The matters alleged in the Second, Third and Fourth Articles are admitted.

Fifth Article of Libel:

The fact that the Master of the vessel gave notice in writing to the consignees on September 4, 1893, of the readiness of the vessel to discharge, the effect of which was, by the terms of the charter-party, to start the lay days running (Apostles, fol. 25), is proven by the testimony of Captain Wilson (fol. 137, New Proofs on Appeal).

Respondents' witness Hime testified that the *Kate Burrill* went alongside the wharf at the saw-mill of the parties to whom consignees sold the cargo, on September 4, 1893. (Answer to Fifth Interrogatory, fol. 96, New Proofs on Appeal. Answer to Fourth Cross-Interrogatory, fol. 118, *id.*)

The discharge of the cargo was not completed until November 28, 1893.

Wilson, fol. 145, New Proofs. Log, fol. 209, *id.*

Hime says November 20th (fols. 94–118).

The Sixth Article of the Libel is admitted.

Seventh Article:

At the time of giving notice on September 4, 1893, the vessel was in fact ready to discharge upon charterers' designating a safe anchorage.

Wilson, fols. 141–142, New Proofs. Hime, fols. 96–118, *id.*

Eighth Article:

The consignees did designate an anchorage, and the vessel hauled to said anchorage on September 5th.

Wilson, New Proofs, 137–138. Log, 173, *id.* Hime, fols. 96–118, *id.*

Ninth Article:

The discharge of the cargo was commenced on September 6, at the designated anchorage.

Wilson, fol. 138, New Proofs. Log, fol. 174, *id.*

Hime says on September 4 (fols. 96–118).

Tenth Article:

The particulars and dates of the discharge of the cargo, as alleged in the libel, are shown by the testimony of Captain Wilson and by the log of the vessel, produced by him and received in evidence without objection. The Log and testimony show the amount of cargo discharged and received by the purchasers each day to have been as follows:

September	6th,	150	pieces.
"	9th,	155	"
"	11th,	105	"
"	12th,	105	"
"	13th,	115	" completing deck load.
"	15th,	142	"
"	16th,	173	"
"	18th,	265	"
"	19th,	262	"
"	20th,	117	"
"	21st,	160	"
"	22d,	239	"
"	23d,	226	"
"	25th,	127	"
"	26th,	380	"
"	27th,	257	"
"	28th,	345	"
"	29th,	499	"
"	30th,	360	"

Up to this time the discharge of the cargo had been proceeded with continuously.

It was then discontinued until October 16th.

October	16th,	434 pieces.
"	17th,	163 "
"	23d,	136 "
"	25th,	413 "
"	27th,	356 "
November	6th,	538 "
"	16th,	296 "
"	17th,	621 "
"	20th,	451 "
"	24th,	337 "
"	28th,	435 "

The cargo delivered at Rio contained 514,256 superficial feet (Art. IV Libel, Art. IV Answer) and at the rate of discharge stipulated in the charter, viz.: "at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted," should have been discharged within 26 days, excluding Sundays, from the date of giving notice of readiness on September 4th. Excluding the four Sundays (Sept. 10th, 17th, 24th and October 1st) the lay days therefore expired October 6th, after which date "$59.46 per day, day by day" became due under the charter. The vessel was detained until November 28th, a further period of 53 days, for which period the libellants claim demurrage at the rate of $59.46 per day, amounting to $3,151.38.

The testimony of the witness Hime that the discharge of the cargo was completed on November 20th (fols. 94–118, New Proofs) is not sufficient to outweigh the testimony of Captain Wilson that the discharge was completed on the 28th (fol. 145) corroborated by the entries in the Log of the vessel, showing the discharge of cargo on November 24th and 28th (fols. 208–209) and the Captain's protest before the Consul (fol. 212).

The cargo was not received by the Company with

which Hime was connected, but by its vendees (fol. 119) and he admits his inability to testify as to the dates on which cargo was discharged (fols. 119–120).

The testimony of Captain Wilson is further corroborated by the letter written by Phipps Bros & Co. to the libellants on November 17th, in which they state: "We saw Captain Wilson a day or two "ago when he told us he had still about 2,000 pcs. "on board and waiting for his consignees to take "them away."

By the Log it appears that on November 16th, 17th, 20th, 24th and 28th, 2,140 pieces were discharged.

That the detention of the vessel was in no manner due to any unreadiness or fault on the part of the vessel or her Master is clearly established.

No fault on the part of the Master or vessel is alleged by the respondents, but on the contrary, the answer alleges (Article 14) that the delay was by reason of the act of the public enemy.

Hime testifies that the delay was due to prohibitory orders on the part of the government (fol. 97, New Proofs).

Captain Wilson testifies that at no time during the month of September while cargo was being discharged daily, did the consignees receive the cargo as fast as the vessel was prepared to discharge it, and that he objected to the slowness of the discharge and was told that as soon as another vessel there was out of the way, his cargo would be taken as fast as he could discharge it (fol. 142, New Proofs). That at no time that month was the cargo taken as fast as at the rate of 20,000 feet per day (143). That after the 30th of September the discharge was suspended because the consignees hadn't warehouse room, and upon his complaining was told that there was no room to put the lumber away on account of the Revolution, that they weren't selling their lumber (143). That during all of the time he kept his crew ready to discharge the cargo and hired extra men to take the places of any who were sick (151).

II.

The defence of an account stated and satisfaction of all claims under the Charter Party is not established.

The claim of the respondents is that the payment of £515 6s 5d made by the consignees to Phipps Bros. & Co. was received and accepted by the latter in full satisfaction of all claims under the charter party.

In considering this claim, certain facts which were fully considered and passed upon by this Court upon the determination of the sufficiency of the exceptions filed to the answer, may be referred to and restated.

By the charter-party it was provided: "The bills "of lading to be signed as presented without preju- "dice to this charter." The bill of lading actually presented by the respondents as charterers, and signed by the Master, provided for "paying freight "for said lumber as per charter-party dated 7th "March, 1893, and average accustomed." The terms of the charter-p[illegible]as to *demurrage* were not incorporated or referred to in the bill of lading, and therefore the endorsee of the bill of lading was not bound by the stipulations of the charter as to demurrage, and he was obliged only to receive the cargo within a reasonable time according to the customs of the port of discharge under the conditions then existing. In other words, the only claim for demurrage *against the cargo or its consignees* was for delay occasioned by the latter's fault.

(Opinion of this Court, fols. 45-49, New proofs).

Captain Wilson testifies that when the lay days expired, he called on the consignees and stated that he intended to claim demurrage, and was told that couldn't claim any demurrage on account of the Revolution (fols. 148-157-158). Hime admits that the Captain called on him about the delay in dis-

charging the cargo and that he told him he had to obey the Government's orders and that he (Hime) had nothing to do with it (97–99). How, therefore, can it be contended that the payment of £515 6s 5d, made by the consignees, was in discharge of a liability which they insist did not exist? Under the terms of the bill of lading, the master had no right to claim as against the consignees demurrage for delay occasioned by the existing Revolution, and his claim for same was met by a refusal to pay based upon that express ground. What was then left for him to do but to enter his protest officially before the consul and reserve his owner's rights?

It should be noted that no account or statement of the demurrage claimed was presented by the Master or by Phipps Bros. & Co. to the consignees, and that the only statement rendered was the one prepared by the consignees and rendered to Phipps Bros. & Co., accompanying the payment of the £515 6s 5d. That statement has been offered in evidence (page 51, New Proofs) and identified by the witness Hime, and it shows that the payment of the £515 6s 5d was for the exact amount of the freight as per charter-party and bill of lading, less the amount of a prior payment on account and the disbursements and commissions of the consignee, stating the details of the computation.

There is absolutely no evidence in the record to support the contention that the payment made was in full satisfaction of all claims under the charter-party.

Hime, indeed, does testify that when he settled with Phipps Bros. & Co. he "was certainly under the impression that when they received the balance due the vessel * * * it was in settlement of all amounts due to the vessel in conformity with the charter-party" (fols. 103–104).

His "impression" undoubtedly was based upon his opinion that no claim for demurrage against *anyone* existed under the circumstances, as he takes pains to state in another part of his answer to the

same interrogatory, and in support of which he cites the cases of three other vessels where no demurrage was claimed. It is apparent from an inspection of the account rendered that, whatever might have been the "impression" of Mr. Hime, the account was one of the indebtedness for *freight only*.

III.

There is no proof of the authority of either the master or Phipps Bros. & Co. to waive the claim for demurrage, or to enter into any accord and satisfaction with the charterers or to receive the sum paid for any other purpose than in payment of freight.

This was the ground of the Fourth Exception filed by the libellants to the answer.

This Court held that the denial by the respondents of the allegation of want of authority contained in the libel was equivalent to an affirmative allegation of authority, and stated as follows:

> "Upon the question whether there was an "accord and satisfaction made by those hav- "ing authority to represent the libellants there- "for, is a question of fact to be determined "upon a view of all the incidents of the trans- "action when the proofs are all before the "Court." (Opinion, fols. 59–60.)

If purporting to act under a power of attorney, it is obvious that the powers of the special agent would be restricted to the four corners of the paper.

Dunlap's Paley's Agency, p. 201.

Does it make any difference that the paper is called a charter-party? If the agent can com-

promise demurrage, he can compromise freight and accept one-half the rate provided, or he can enlarge the number of lay days, and thus reduce the demurrage or decrease the stipulated rates of demurrage, and reach the same result. The charterers had the charter and that told them what their contract obligations were, and that they were dealing with an agent whose *duty was expressed in the paper*, viz., collect the agreed freight and demurrage.

Dunlap's Paley's Agency, p. 201: "Nor can an "agent without express authority compound a "debt."

Abbott on Shipping (12 Eng. ed.), p. 89:

"But if the owners themselves have made a "*special contract* for the employment of their "ship, the master cannot, by the general and "implied authority of his character as master "only, annul such a contract and substitute "another for it, with the other contracting "party."

In other words, by this charter, the shipper had 26 days (by computation) to discharge in. The master could not give him 30, nor change the rate of $59.46 fixed by the charter for each day's demurrage, and if he could not do so directly, he certainly could not do so indirectly by an "accord and satis-"faction."

Even an attorney-at-law has no power to compromise.

Holker *v.* Parker, 7 Cranch, 436.

Burgon *v.* Sharpe, 2 Campbell, 529. Action for freight and demurrage, on a memorandum for a charter; voyage from London to Buenos Ayres and back.

Lord Ellenborough:

"The captain was captain for the voyage "originally agreed upon, and on which the "vessel sailed from England. *Everything out*

" *of that voyage was beyond the scope of his* " *authority as captain.* As such he had no " power to change that voyage for another."

" The person who is intrusted with the com- " mand of a ship may be vested with a complete " control as to her employment and destina- " tion; but this is superinduced upon his " authority as captain; and to show that the " captain in this case could do away with the " contract entered into by the owner and con- " clude a fresh contract binding on both par- " ties, you must go further than merely show- " ing that he was captain of the ship."

Sickens *v.* Irving (1859), 7 Com. B., 165.

Williams, *J.* (171):

" Now there can be no doubt that an agent " appointed to load a cargo at a foreign port " has authority to do all acts that are necessary " for the performance of the contract; and " also to vary the mode of performance if " any exigency arises, provided the contract " be substantially performed.

" But there is no ground for contending that " he has by law any implied authority to sub- " stitute a new contract, to substitute one sort " of commodity for another, sugar for salt for " instance, or to appoint a different place of " loading from that contemplated by the char- " ter party. It is quite new to me to hear it " suggested that he has such authority, and I " cannot but think IT WOULD BE VERY MIS- " CHIEVOUS if the agent's authority could be " so extended as thus to vary the contract of " his principal."

Byles, *J.* (173):

" It was contended that the agent necessarily " had an implied authority to deviate from the " strict letter of the charter-party, or, in other

"words, that they had an implied authority to "direct the loading of a different article in a "distant port. It seems to me, however, that "the agents had no such authority in point of "law."

Earl, *C. J.*:

"I think this decision is one of very consid- "erable importance, for, if Mr. Wilde had suc- "ceeded in his argument, it might have thrown "doubt upon the well known and to the mer- "cantile world, most IMPORTANT rule, that an "agent must be strictly limited by his author- "ity."

The only evidence bearing upon the question of the authority of Phipps Bros. & Co. is that of the witness Hime, who testified that the Companhia Industrial do Brazil received a letter from Phipps Bros. & Co. in which the latter stated that they were the attorneys for the owners of the vessel, instructed the company not to give the captain any money but to liquidate the accounts of the vessel with them. The letter itself was not produced, the witness stating his recollection of its contents (fol. 94-95, New Proofs).

This testimony is clearly insufficient to sustain a contention that Phipps Bros. & Co. had authority to waive or compromise the libellants' right to demurrage under the charter-party.

IV

The libellants are entitled to recover interest on the amount due.

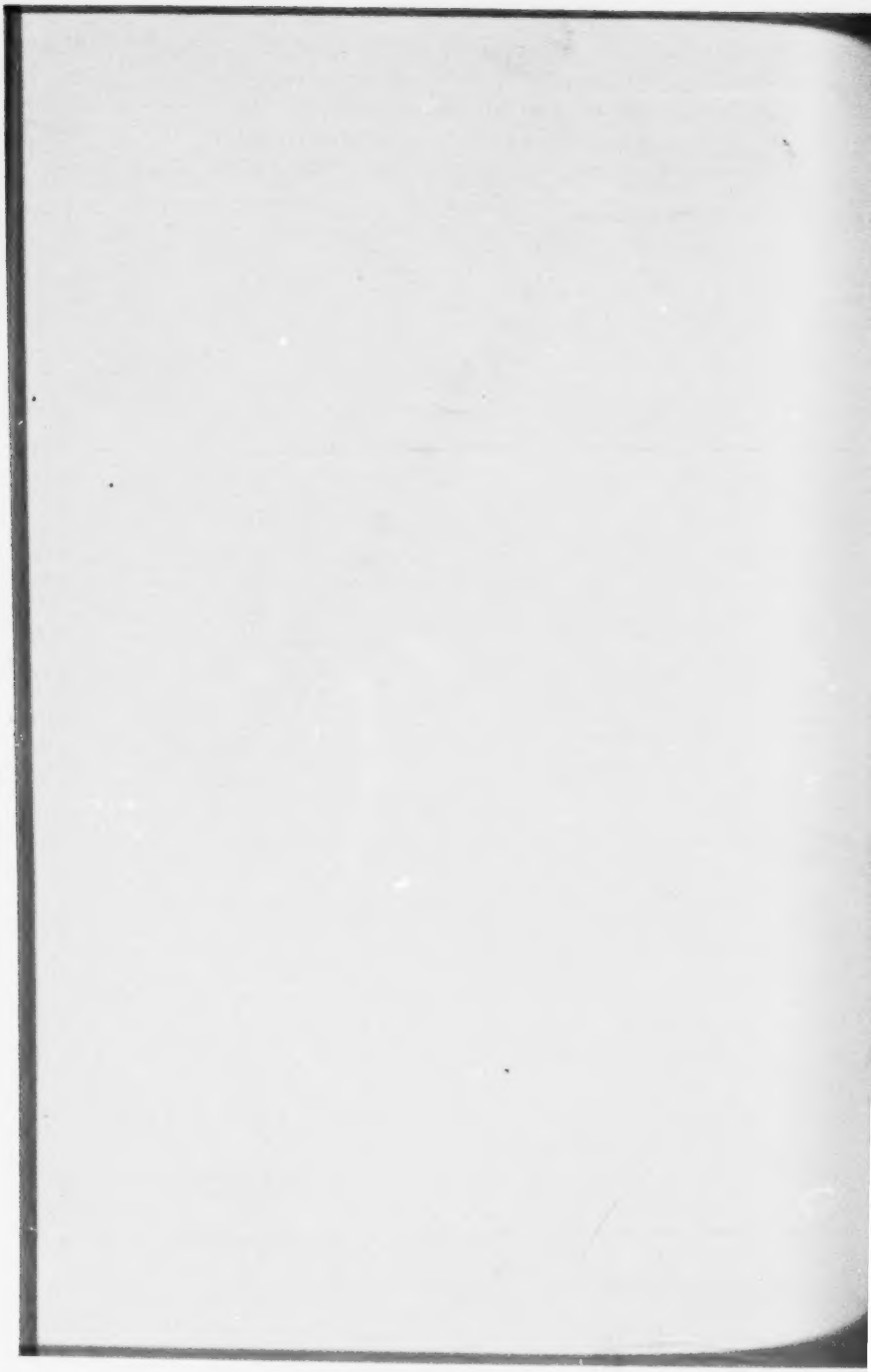
Milburn *v.* 35,000 boxes of oranges, 57 F. R., 236.

LASTLY—The decree of the District Court should be reversed, and the cause remanded to that Court

with directions to decree in favor of the libellants for $3,151.38 with interest from November 28, 1893, with costs of the District Court and of this Court.

BLACK & KNEELAND,
Proctors for Libellants.

LAWRENCE KNEELAND,
Advocate.



No. 1899 26

Supreme Court of the United States.

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October Term, 1899.

No. 187

Brief of Kneeland for Appellees.

GEORGE W. CROSSMAN *et al.*,

Petitioners and Appellants.

Filed Mar. 7, 1900.

versus

WILLIAM BURRILL *et al.*,

Appellees.

BRIEF FOR APPELLEES.

LAWRENCE KNEELAND,

of Counsel.

JOHN POLHEMUS PRINTING COMPANY, Printers and Mf'g Stationers, 121 Fulton Street, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1899.

GEORGE W. CROSSMAN *et al.*,
Petitioners and Appellants.
vs.
WILLIAM BURRILL *et al.*,
Appellees.

No. 187.

BRIEF FOR APPELLEES

Statement.

The above cause comes before the Court by virtue of a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals reversed the decree of the District Court for the Southern District of New York dismissing the libel, and directed that Court to decree in favor of the appellees for fifty-three days' demurrage, amounting to $3,151.

The libel was filed by the appellees, owners of the Bark *Kate Burrill*, to recover from the respondents fifty-three days' demurrage, under a written charter-party of said vessel, entered into between the libellants and the respondents, on March 7, 1893, for a voyage from Pensacola to Rio de Janeiro, by which the respondents engaged to provide a full and complete cargo of lumber,—

> "Cargo to be furnished at port of loading at the average rate of not less than (20 M.)

Twenty thousand superficial feet per running day, Sundays excepted, and to be discharged at Port of Destination at the average rate of not less than (20 M.) Twenty thousand superficial feet per running day, Sundays excepted.

Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent ($59.46/100) Fifty-nine 46/100 dollars U. S. Gold (or its equivalent), per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

The cargo to be received at the port of loading within reach of ship's tackles, and to be delivered at port of discharge, according to the custom of said port.

Vessel to discharge at safe anchorage ground in Rio Bay designated by Charterers.

The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in Charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed.

The vessel to be consigned to Charterer's agents at port of discharge, inwards only, paying them a consignment commission of 2½ per cent. on the amount of this charter, for doing vessel's inward business.

The dangers of the seas, fires, and navigation of every nature and kind, always mutually excepted."

The respondents shipped at Pensacola 534,194 feet of lumber, of which 67,333 feet were on deck, and bills of lading for said cargo were presented by the respondent to the master and signed by him on May 5, 1893.

The bills of lading provided that said cargo should be "delivered in the like good order and "well conditioned, at the aforesaid port of Rio de "Janeiro (the dangers of the seas, fire and collision "excepted) unto order or to their assigns, *they* "*paying freight for the said lumber as per charter* "*party dated 7th March, 1893*," and average ac- "customed."

These bills of lading were assigned by the respondent to the Companhia Industrial do Brazil, the respondent's agent at Rio, to whom the vessel was consigned, and were assigned by the latter company to Manoel da Cruz y Filho, purchasers of the lumber.

The vessel arrived at Rio on August 30, 1893, where she delivered 514,256 feet of lumber, a portion of her deck load, amounting to 19,939 superficial feet, having been lost by sea perils.

The original libel alleged that on the 4th day of September, 1893, notice in writing that the vessel was ready to discharge her cargo was duly given by the master to respondent's agent, who received the cargo, but did not discharge the same at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted, but, on the contrary did not complete the discharge until Nov. 28, 1893, a period of fifty-three days, beyond the twenty-six days exclusive of Sundays, allowed by the charter, for which period libellants claimed demurrage at the charter rate of $59.46 per day.

The answer set up the following defenses:

(1) That by reason of the clause in the charter party "vessel to have an absolute lien upon the "cargo for all freight, dead freight and demurrage. "Charterer's responsibility to cease when the vessel "is loaded and bills of lading signed," all liability on the part of the respondents under said charter party had ceased, and it became the duty of the master to hold the cargo until the demurrage was paid by the consignees of the cargo.

(2) That the owners of the cargo were prevented from removing the cargo from the vessel sooner than they did by reason of the acts of the public enemy, to wit, certain vessels of war which were then in Rio harbor and making war upon the Government of Brazil.

(3) The payment to Phipps Brothers & Co., libellants' agents at Rio, by the consignees, of the sum of £515 6s. 5d., in full satisfaction of all claims under the charter party; the statement of an account between them, and the acceptance of said sum in full satisfaction.

Libellants filed exceptions to each of these defenses as insufficient in law and the case was heard in the District Court upon said exceptions.

The District Judge sustained the exception to the defense based on the "cesser clause" in the charter party; overruled the exception to the second defense, holding that the duty of the ship to deliver and that of the charterer to receive were concurrent duties, and that there was no "default" on the part of the charterer while the ship was unable to deliver; and that the libel did not allege actual readiness of the ship to deliver, but only that notice of readiness was given.

The exception to the third defense of accord and satisfaction was also overruled.

Libellants thereupon moved to amend the libel so as to set forth actual readiness of the ship to deliver at the time of the giving of notice on September 4th; the designation of an anchorage by charterer's agent; the hauling of the vessel to such anchorage on September 5th; the commencement of the discharge of the cargo on September 6th, and the particulars and dates of the discharge of the cargo thereafter. Also by alleging want of authority in the master or agents of libellants at Rio to make and state an account on behalf of the libellants, and that the payment to libellant's agent was for freight only.

This application was denied by the District Judge, who made a decree dismissing the libel. (Record 36.)

The libellants thereupon appealed to the Circuit Court of Appeals and in that court renewed the application to amend the libel, which application was granted. (Record 44.) The amended libel contains the following additional allegations: That the charter party provided "Vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers." (Record 46.)

That at the time of giving notice on Sept. 4th of readiness to discharge, the vessel was in fact ready to discharge upon charterer designating a safe anchorage for that purpose. (Record 46.)

That the charterer did designate an anchorage, and on September 5th the vessel proceeded thereto. That on September 6th the discharge of the cargo was commenced at such anchorage, continued on the 9th and proceeded with continuously from September 11th to September 30th; discontinued until October 16th, continued on the 17th, 23d and 27th of October, and 6th, 17th, 24th and 28th of November, when it was completed; that at all times when the discharge was suspended the vessel was ready and willing to proceed with same. (Record 46-47.)

That the total freight at charter rate amounted to £1390-6-5; that in November the respondents' agents made up an account of the amount of freight due, credited themselves with £875 paid on account, leaving a balance due for freight of £515-6-5, which sum they paid to libellants' agents at Rio on Dec. 7th. That no other account or payment was made for freight, no amount paid, or account stated, for demurrage, and that the sum of £515-6-5 was received in full of the freight and not otherwise. That on Dec. 12, the master appeared before the British Consul and made formal protest against the detention of the vessel, stating that he claimed demurrage amounting to $3,159.38, which the consignees refused to pay. (Record 47.)

It further alleges that neither the master nor the libellants' agent at Rio had authority to enter into any accord and satisfaction with the charterers or

to receive the sum paid for any other purpose than as payment of freight due under the charter. (Record 47–48.)

The answer of the respondents to the amended libel set up the same three defenses as were interposed to the original libel, namely: The "cesser clause" (Art. 14, Record 49), that the detention was caused by the acts of the public enemy (Art. 15, Record 49–50), an accord and satisfaction (Art. 16, Record 50).

Exceptions were filed by the libellants to these defenses, as insufficient in law, and said exceptions were argued before the Circuit Court of Appeals.

That Court sustained the exceptions to the fourteenth and fifteenth articles of the amended answer, which pleaded as defenses the "cesser clause" and the state of war existing at Rio; and overruled the exception to the plea of accord and satisfaction, holding that this question was one of fact to be determined upon a view of all the incidents of the transaction when the proofs were before the Court. (Record 54–59.)

Thereupon testimony was taken by both parties. Wilson, master, and William Burrill, managing owner of the vessel, being examined on behalf of the libellants, and Hime, Director of Companhia Industrial do Brazil, on behalf of the respondents.

This testimony bore upon the circumstances connected with the payment of £515-6-5 alleged by the respondents to be in settlement of all claims under the charter, and was also in support of the allegations of the amended libel respecting the discharge of the cargo, which the answer had denied.

The testimony established the following facts:

The arrival of the vessel at Rio on August 30th. (Wilson, 73; Hime, 66.)

That the master gave notice in writing to the consignees on Sept. 4th of readiness to discharge. (Wilson, 74; Hime, 70.)

At the time of giving such notice the vessel was, in fact, ready to discharge upon charterers designating an anchorage. (Wilson, 75; Hime 70.)

An anchorage was designated and the vessel hauled to such anchorage on September 5th. (Wilson, 74 ; Hime, 66.)

The discharge of the carge was commenced on Sept. 6th at the designated anchorage. (Wilson, 74; Hime says on Sept. 4th, 66.)

The cargo was discharged as follows:

September	6th,	150	pieces.
"	9th,	155	"
"	11th,	105	"
"	12th,	105	"
"	13th,	115	" completing deck load.
"	15th,	142	"
"	16th,	173	"
"	18th,	265	"
"	19th,	262	"
"	20th,	117	"
"	21st,	160	"
"	22d,	239	"
"	23d,	226	"
"	25th,	127	"
"	26th,	380	"
"	27th,	257	"
"	28th,	345	"
"	29th,	499	"
"	30th,	360	"
October	16th,	434	"
"	17th,	163	"
"	23d,	136	"
"	25th,	413	"
"	27th,	356	"
November	6th,	538	"
"	16th,	296	"
"	17th,	621	"
"	20th,	451	"
"	24th,	337	"
"	28th,	435	"

The cargo discharged at Rio contained 514,256 superficial feet. (Libel Art. IV. Ans. Article IV.)

At the rate of discharge stipulated in the charter, viz., "at the rate of not less than twenty thousand "superficial feet per running day, Sundays excepted," it should have been discharged within 26 days, excluding Sundays, from the date of giving notice of readiness on Sept. 4th. The lay days therefore expired on October 6th, after which date $59.46 per day, day by day, became due under the charter, for the 53 days down to Nov. 28, amounting to $3151.38.

The delay in discharging was in no manner due to any unreadiness on the part of the vessel or her master. (Wilson 77).

When the lay days expired the master called on the consignees and stated that he intended to claim demurrage and was told that he could not collect demurrage on account of the revolution. (Wilson 79).

Respondent's witness Hime admits that the master called on him about the delay in discharging and that he told him that he could not help him and that he had to obey the orders of the government (66).

No statement or account of demurrage claimed was presented by the master or by Phipps Bros. & Co. to the respondent's agents (67), the only statement rendered being the one prepared by the respondents' agent and rendered to Phipps Bros. & Co., accompanying the payment of the £515-6s. 5d. This statement appears at pages 69-70, and shows that the sum of £515 6s. 5d. was the exact amount of the freight as per charter party, less the amount of a prior payment on account.

POINTS.

I

The cesser clause in the charter party does not constitute a defense.

The charter party contains the following provisions:

> "For each and every day's detention by default of the said party of the second part of agent, $59.46 U. S. gold (or its equivalent) day by day shall be paid by the said party of the second part or agent to the said party of the first part or agent."
>
> "The bills of lading to be signed as presented, without prejudice to this charter."
>
> "Vessel to have an absolute lien upon the the cargo for all freight, dead freight and demurrage."
>
> "*Charterer's responsibility to cease when "the vessel is loaded and bills of lading are signed.*"

The bill of lading presented by the charterers and signed by the master recites the shipment by the charterers "to be delivered * * * at the aforesaid port of Rio de Janeiro unto *order or their assigns, they paying freight for the said lumber as per charter party dated 7th March, 1893*, and average accustomed. The answer alleges that the bills of lading were duly signed and delivered to Companhia Industrial do Brazil and were assigned and delivered by the latter to Manoel da Cruz & Filho who thereby became the consignees of said cargo. (49)

Both courts concurred in holding that the "cesser clause" did not constitute a defense to the libellants' claim.

The considerations upon which the District Judge based his decision, which were cited at length and approved by the Appellate Court, briefly stated, were as follows:

(1) The master was, under the terms of the charter party, required to sign bills of lading as pre-

sented by the charterers, but this was to be without prejudice to the charter.

(2) The bill of lading, not incorporating or referring to the charter provision as to demurrage, imposed no obligation upon the indorsee, who received the cargo under it, to pay the charter demurrage.

(3) The various provisions of the charter party are contradictory in form, but contemplated a lien by the ship-owner for the demurrage, and its proper construction, as a whole, required that the "cesser clause" should apply only so far as the charterers has secured to the ship-owner a lien co-extensive with the charterer's liability.

1 The captain was bound to sign the bills of lading as presented by the charterer.

Hanson v. *Harold* (1894), 1 Q. B., 612–618:

> Lord Esher. "The charter party provides "that the captain is to sign bills of lading "(Australian and New Zealand trade) ac- "cording to the custom of the port at the "current or any rate of freight that may be "required without prejudice to the charter- "party. It was argued that that enabled "the captain to say that he would not sign "bills of lading, unless they in terms gave "him all the rights which are given by the "charter-party--that the words without prej- "udice to the charter-party entitled the "captain to insist, and he ought to have in- "sisted, on the insertion in the bills of "lading of the words 'all other conditions "as per charter party.'
>
> "The meaning of these words has been "settled by decisions which cannot be "questioned. The meaning as settled by the "case of Shand *vs.* Sanderson, 28 L. J. Ex. "278, and Gledstanes *vs.* Allen, 12 C. B., 202, "is that it is a term of the contract between "the charterers and the ship-owners, that, "notwithstanding any engagements made "by the bills of lading, that contract shall

"remain unaltered. Therefore in this case "the captain was bound to sign the bill of "lading presented to him, but his doing so "was to be 'without prejudice to the char- "ter-party.' These words do not limit the "obligations under the charter-party to sign "the bills of lading presented to him, but "when he has done so, it does not affect the "contract contained in the charter-party. "If a ship-owner puts up a ship as a general "ship, he may insist on a bill of lading in "any terms he pleases, or he may refuse to "take the goods. Here the ship-owner de- "prives himself of that right and agrees to "sign bills of lading as presented. *There- "fore the captain was bound to sign the bill "of lading, as he did.*"

2. It is well settled that the indorsee of a bill of lading is liable only for the terms of the bill.

In this case the bill of lading required the delivery of the cargo *on payment of freight as per charter party.*

If the consignee had failed to receive the cargo within a reasonable time, in view of the existing conditions at the port of discharge, while he would have been liable for damages *in the nature of demurrage* for such detention, he was not liable for demurrage at the charter rate nor for the despatch provided for in the charter.

In re Bags of Linseed, 1 Black, 108–112.

"The rights of the parties in this case "depend altogether on the contract made "in the bill of lading. That instrument "does not refer to the charter party, nor "can the charter party influence in any de- "gree the decision of the question before "us. Augustine Wills was not a party to "it and it is not material to inquire whether "he did or did not know of its existence "and contents, for there is nothing in it to "prevent Wills & Co., the sub-charterers, "or Augustine Wills, the consignee, from "entering into the separate and distinct con- "tract stated in the bill of lading, and the

"assignee took the rights of Wills & Co.,
"in this contract and nothing more."

The *H. G. Johnson*, 48 Fed., 696.

Chappell v. *Comfort*, 10 C. B. (N. S.), 810.

This was an action against the indorsees of the bill of lading for demurrage at the port of discharge. By the charter party sixteen lay days were allowed for loading and unloading, and there was demurrage at 2 £ per day for any detention beyond that time. By the bill of lading the goods were deliverable to order "*paying freight as per charter party*," and there was also a memorandum written in the margin, "There are eight working days for "unloading in London."

Judgment was given for defendant.

Wills, *J.* "It may be, and it often does "happen, that the person who receives the "goods intends to pay all the charges men-"tioned in the charter party. But when it "is intended that such an obligation should "be imposed on him it should be done in "plain words, as was done in Wegener *v.* "Smith (15 C. B., 285) and other cases, "where by the terms of the bill of lading "the goods were made deliverable to order "'against the payment of the agreed freight "and other conditions as per charter party.' "* * * There must be a plain intention "expressed that the consignee of the bill of "lading is to pay demurrage before he can "be charged with it. This is an established "rule to which it is highly important to "adhere."

Smith v. *Sieveking*, 5 E. & B., 589.

The same rule was applied, where the language of the bill of lading was "*paying for the goods as "per charter party.*"

Fry v. *Chartered Bank of India*, L. R., 1 C. P., 689.

Gray v. *Carr*, L. R., 6 Q. B., 522, 543.

"It is clear that the plaintiff can only "have a lien for any of these claims" (demurrage, detention and dead freight) "by "express contract, inasmuch as the lien "which, as shipowner, he would have independently of any contract would only "extend to the actual freight of the goods "carried. * * * Further, although the "charter party may contain an express contract giving him such a lien on the goods "as against the charterer, yet he could not "have the lien as against the indorsee of a "bill of lading, unless it is stipulated for in "the bill of lading, either by the incorporation of the clause in the charter party, or "by its being expressly mentioned."

Dayton v. *Parke*, 142 N. Y., 391.

Action against consignees of a cargo of lumber shipped by charterers. The charter party provided for customary dispatch in discharging and that $52 should be paid for "each and every day's detention "by default of charterer or agent."

The bill of lading provided for delivery of the cargo to the consignee, they *paying freight as per said charter party and its conditions.*

It was held that the reference in the bill of lading to the charter party was confined to the conditions of the latter instrument as to the payment of *freight* and that the charter-party provisions as to demurrage were not made part of the bill of lading.

These cases are clearly opposed to the appellant's contention that the mention of the charter-party in the bill of lading in connection with freight was sufficient to impose its provisions as to demurrage upon the consignee.

The distinction between this case and cases where "all other conditions as per charter-party" is inserted in the bill of lading is a well-recognized one.

Porteous v. *Watney*, L. R., 3 Q. B. D., 534, 537.

"The cases of Chappell *v.* Comfort, 10 C. "B. (N. S.), 802; Fry *v.* Chartered Bank of

"India, L. R., I. C. P., 698; and Smith *v.*
"Sieveking, 4 E. & B., 945; 5 E. & B., 589,
"which have been cited on behalf of the
"defendants in the present case, so far from
"weakening the authority of Wegener *v.*
"Smith, 15 C. B., 285, appear to me to tend
"still further to strengthen it. In each of
"them the reference to the charter-party
"contained in the bill of lading was either
"expressly by the use of the words 'freight
"as per charter-party', as in the two first
"cases, or impliedly by the use of the
"words 'paying for the said goods as per
"charter-party', as in the last case, limited
"to the condition in the charter-party re-
"lating to freight, and was held to be made
"simply for the purpose of ascertaining the
"rate of freight, and not for the purpose of
"imposing an obligation upon the holder of
"the bill to perform the conditions of the
"charter-party generally."

3. The charter-party provides:

"Vessel to have an absolute lien upon the
"cargo for all freight, dead freight and de-
"murrage."

The action of the charterers in requiring the master to sign bills of lading not incorporating the demurrage provision, as has been shown, deprived the vessel of its lien for the demurrage.

The "cesser clause" immediately follows the above quoted stipulation for a lien and reads, "Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed." It should be noted that, when charter parties contain the "cesser clause" such clause is invariably coupled with a stipulation for a lien by the vessel for the charter liability, the manifest intention being to substitute, for the personal liability of the charterer, a lien upon the cargo commensurate or co-extensive therewith. When by the action of the charterer the lien of the vessel has been impaired, the "cesser clause" has uniformly been construed

to release the charterer from liability only in so far as he has secured to the vessel its lien.

The "cesser clause" is sometimes called the "lien and exemption clause." *Scrutton, Charter Parties and Bills of Lading* (1 Ed.), 101.

In *Hatton* v. *De Belaunzaran*, 26 Fed., 780, Judge Brown held charterers responsible for demurrage notwithstanding the "cesser clause" because under a re-charter of the vessel which the master was required to execute by virtue of the provision. "If required by charterers, captain to sign re-charter without prejudice to this charter," the vessel had been required to take a cargo of insufficient value at the port of discharge to pay more than the sub-charter freight.

In *Gray* v. *Carr*, L. R., 6 Q. B., 522-545, Channel *J.*, in discussing the "cesser clause", states:

> "We have been pressed in the argument "with the clause in the charter-party that "the charterers' responsibilities are to cease "on shipment of the cargo, provided it be "of sufficient value to cover the freight and "charges on arrival at the port of discharge. "It has been contended that all the char- "terers' responsibilities for all breaches of "contract were to cease on shipment; and "that therefore it must have been intended "that there should be a lien on the goods, "otherwise the shipowners would be without "remedy. It is not, of course, necessary "for us to decide whether the charterers "were or were not relieved from responsi- "bility in respect to the claims which we "now decide the shipowner cannot main- "tain against the defendants. * * * "*Probably the charterers' responsibilities* "*which are to cease are the responsibilities* "*in respect to those matters for which a lien* "*is created;* but the difficulties in the way "of creating a lien for unliquidated dam- "ages, and the stipulation that the cargo is "to be of sufficient value to cover the freight "and charges only, and not the freight, "charges and all damages, afford a stronger

"augument for holding that *there is no lien*
"*and therefore no cesser of responsibility*
"of the charterers as regards the damages,
"than for holding that there is a cesser and
"therefore a lien."

Francesco v. *Massey*, L. R, 8 Ex., 101–106.

Bramwell, *J.*: "It seems impossible to "hold that the matters as to which the lia-"bility was to cease were not the same as "the matters as to which the lien was "given."

Kish v. *Corey*, L. R., 10 Q. B., 553–559.

Brett, *J.*: "Three interpretations of the "clause may be suggested. By the first, "liability of every kind, as well for past as "for future breaches, is to cease, so far as "the Charterer is concerned. By the "second the Charterer is exempted only "from future liability—that is, after the "loading of the ship; but in each case the "ship-owner can enforce his remedy against "the consignee by his lien on the cargo. "By the third the Charterer's liability is to "cease, but only a partial remedy is given "to the ship-owner by the lien against the "consignee—that is, he can exercise his "lien for demurrage, but not for detention. "If this last were the legal interpretation of "the clause I should think it so unjust that "I should be prepared to overrule former "decisions, upon which it is based, for I "cannot think that it would express the "real intention of the parties."

Clink v. *Radford* (1891), 1 Q. B , 625.

Plaintiffs chartered their vessel to defendants to load a cargo of coal "in the usual and customary manner," and to deliver same at the port of discharge at the average rate of not less than 100 tons per working day, "the charterer's liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage."

Plaintiffs sued to recover damages for detention at the port of loading.

It was held that damages for undue detention at the loading port were not covered by the word "demurrage" in the lien clause, and that the "cesser clause" did not exonerate the charterers.

Lord Esher (627): "In my opinion the "main rule to be derived from the cases as "to the interpretation of the cesser clause "in a charter-party is that the Court will "construe it as inapplicable to the particu- "lar breach complained of, if, by construc- "ing it otherwise, the shipowner would be "left unprotected in respect of that par- "ticular breach complained of, unless the "cesser clause is expressed in terms that "prohibit such a conclusion. In other "words, it cannot be assumed that the "shipowner, without any mercantile reason, "would give up by the cesser clause rights "which he had stipulated for in another "part of the contract. If that be true, then "the question in this particular case, as in "every other case, will depend upon this, "whether if we apply the cesser clause to "the particular breach complained of, and "so hold the charterer to be free, the ship- "owner has any remedy for his loss. If he "has, we should construe the cesser clause "in its fullest possible meaning, and say "that the charterer is released; but if we "find that, by so construing it, the ship- "owner would be left without any remedy "whatever for the breach, then we should "say that it could not have been the mean- "ing of the parties that the cesser clause "should apply to such a breach."

Bowen, L. J. (629): "The cesser clauses, "as they generally come before the courts, "are clauses which couple or link the pro- "visions for the cesser of the charterer's "liability with a corresponding creation of "a lien. There is a principle of reason "which is obvious to commercial minds, "and which should be borne in mind in "considering a cesser clause so framed, "namely, that reasonable persons would "regard the lien given as an equivalent for

"the release of responsibility which the "cesser clause in its earlier part creates, "and one would expect to find the lien "commensurate with the release of liability. "* * * That being the principle of con- "struction to apply, one would not expect "to find a shipowner placing his ship and "himself at the mercy of a charterer with- "out some equivalent, or contracting on a "given event to release the charterer from "all liability unless there was some other "method of protecting himself against the "act of the charterer."

Fry, L. J. (9632): "The rule that we are "*prima facie* to apply to the construction "of a cesser clause followed by a lien clause "appears to me to be well ascertained. "That rule seems a most rational one, and "it is simply this, that the two are to be "read, if possible, as co extensive. If that "were not so we should have this extraor- "dinary result: there would be a clause in "the charter-party the breach of which "would create a legal liability, there would "be a cesser clause destroying that liability, "and there would then come a lien clause "which did not re-create that liability in "anybody else. What would be the use of "a stipulation if the moment it was created "it was taken away and was not laid upon "some one else's shoulders? Such a con- "struction would strike anyone as being "most unreasonable, and therefore it is not "one which the Court ought to adopt unless "absolutely driven to it."

In *Hansen* v. *Harrold* (1894) 1 Q. B., 612, the same Court further considered the effect of the cesser clause where the freight payable under the bill of lading for cargo shipped under a sub-charter did not equal the charter freight. The charter provided that the charterers might re-charter at any rate of freight without prejudice to the charter party, captain to sign bills of lading at any rate of freight required without prejudice to the charter-party; "the liabilities of the charterers to cease on "the vessel being loaded, the master and owners

"having a lien on the cargo for all freight and de-
"murrage under this charter party." The bill of lading did not refer to the charter party.

The charterers were held liable for the difference in freight.

Lord Esher: (617)

> "We have to construe the different "parts of this contract having regard "to the other parts of the contract "dealing with the same subject matter. "The stipulation that the freight should be "a lump sum of 4000 l. *prima facie* imports "a contract to pay such portion of that sum "as might not have been paid in accordance "with the terms of the charter party at the "port of loading, when the ship arrived at "the port of discharge.
>
> "A stipulation for the cesser of the lia-"bility of the charterers as soon as the "cargo is loaded, if it stood alone, would be "entirely in favor of the charterers, and is "one which, it is obvious, the shipowner "would not agree to, unless it was coupled "with something else, viz., that the master "and owners were to have a lien on the "cargo for the charter-party freight. Taking "the two branches of the clause together, "what is their true construction? They "must be construed according to the rule in "*Clink* v. *Radford*."

After quoting from his opinion and that of his associates in that case, he proceeds:

> (618) "It seems to me that this reasoning "has not been and cannot be answered. "Therefore the proposition is true that "where the provision for cesser of liability "is accompanied by the stipulation as to "lien, then the cesser of liability is not to "apply in so far as the lien which by the "charter party the charterers are able to "create, is not equivalent to the liability of "the charterers.
>
> "Where in such a case, the provisions of "the charter party enable the charterers to "make such terms with the shippers that "the lien which is created is not commen-"surate with the liability of the charterers

> "under the charter party, then the cesser
> "clause will only apply so far as the lien
> "which can be exercised by the shipowner
> "is commensurate with such liability."

Davey, L. J. (620–1).

> "It is to be observed that the words
> "'the master and owners having a lien'
> "&c. do not create a lien; the lien
> "arises subsequently on the goods being
> "shipped, and could only in this case
> "come into operation when the vessel was
> "re-chartered. * * * They im-
> "port, in my opinion, a contract to give or
> "procure a lien. I should myself think it
> "a reasonable construction to hold that the
> "creation of a lien was a condition precedent
> "to the cesser of liability, the effect being
> "that the liability of the charterers would
> "only be discharged in so far as it was re-
> "placed by the lien. I do not desire, how-
> "ever, to rest my judgment on that ground,
> "because it is not the view adopted in the
> "earlier cases, and it is not necessary to
> "adopt it for the purposes of this case. It
> "is sufficient to say that the two branches
> "of the clause thus linked together form
> "correlative stipulations."

See also *Brankelow S. S. Co.* v. *Canton Ins. Co.* (1899) 2 Q. B., 178–184.

II.

The fact that the discharge of the cargo was prevented by reason of the acts of the public enemy, if established, would not constitute a defense.

The 15th Article of the amended answer alleges that "when said vessel arrived at Rio the owners of the cargo "used all reasonable diligence in and "about receiving the cargo shipped upon the said "vessel and removing the same therefrom.

"*That libellants were prevented from discharg-*
"*ing the same*, and respondents were prevented
"from receiving the same any sooner than they
"did, *by reason of the acts of the public enemy*,
"* * and that the detention alleged in the libel
"* * was caused by said acts of the public
"enemy *and not* by any default of the respond-
"ents.

"That the captain * * acquiesced in the de-
"lay and recognized the necessity therefore."
(pp. 49-50.)

The exception to the above allegations was that they are insufficient in law to constitute a defense.

The charter-party provides:

"Cargo to be *discharged* at port of destination
"at the average rate of not less than 20,000 super-
"ficial feet per running day, Sundays excepted.
"Lay days to commence from the time the vessel is
"ready to receive or discharge cargo, and written
"notice thereof is given to the party of the second
"part (charterer) or agent, and for each and every
"day's detention *by default of the said party of*
"*the second part* (charterer), or agent, $59.46 U. S.
"gold per day, *day by day*, shall be paid by the
"said party of the second part (charterer), or agent,
"to the said party of the first part (libellants),
"or agent.

"Vessel to discharge at a *safe anchorage ground*
"in Rio Bay, *designated by charterers*."

The only exceptions in the charter-party are "dangers of the seas, fires and navigation."

Two questions are presented:

1. Were the respondents in default?

2. Does the allegation that "libellants were prevented from discharging the cargo by reason of the acts of the public enemy" excuse the respondents' default?

I. The charterers were under an absolute engagement to designate a safe anchorage at which the vessel could discharge.

The language of the charter-party is: "Vessel to discharge at a *safe* anchorage ground in Rio Bay *designated* by *charterers*."

Ryan v. *Graham*, 1 Best & Smith, 773.
31 L. J., Q. B., 26.

Charter of a vessel from Swansea to "a safe port in Chili (with leave to call at Valparaiso); twenty-five working days for discharging, to commence from notice being given of the vessel's readiness to deliver.

The vessel arrived at Valparaiso and was ordered to Carrisal Bajo to discharge. Carrisal Bajo was a safe port by nature, but had been declared closed by the Chilian government in consequense of rebellion. Any vessel discharging there without a permit would be liable to confiscation. When the charter party was made both parties were ignorant of the fact that the government had closed any port. The order to discharge at Carrisal Bajo was *bonafide*, the cargo being intended for that port by the charterers.

The vessel lay at Valparaiso for thirty-eight days until a permit was obtained, and her owners sued the charterers for the detention and recovered.

> Wightman, *J.* (779). "As Carrisal Bajo "was a port into which a vessel could not "enter without confiscation, it seems to me "clearly not within the terms contemplated "by the parties * * * * * the charterers "must pay the damages occasioned by the "breach of contract in *not naming a safe* "*port*, to which they have made themselves "liable by the specific terms of the "contract."

Sleeper v. Puig, 17 Blatch., 36.

Judge Blatchford held that under a charter party providing "dispatch for loading at New York and

discharging at Havana," the risk of delay in obtaining a place of discharge at the mole was on the charterers and not on the vessel.

> (p. 40)—"That a delay in finding a place "to discharge is as much within the mischief "sought to be obviated by the requirement "of 'dispatch for discharging,' in the charter "party as a delay in receiving the cargo "after the vessel reaches its wharf; and "that the respondents are liable for all "delay from the time of reporting of the "vessel at her anchorage near the mole in "readiness to deliver the cargo."

To same effect is *Davies v. McVeagh*, L. R., 4 Ex. D., 265.

It is not necessary that the failure of the charterers to receive the cargo should be due to negligence on their part to constitute *default*. *Default* as used in the charter party means *failure* or *omission*.

Default is defined as follows:

Century Dictionary.

1. "A failing or failure; an omission of that which ought to be done, neglect to do what duty, obligation or law requires."

3. "A fault, an offense, a misdeed, a wrong act."

Abbott Law Dict. Vol. 1, p. 356.

"The neglect or omission of a duty, or failure to perform an obligation."

Burrill's Law Dict. Vol. 1, p. 459.

"Omission; neglect or failure." * * * * "Omission or non-performance of duty."

In almost every mortgage it is provided that the principal shall become due "upon default" in paying interest.

In the Statute of Frauds the word "default" occurs in the phrase "debt, default or miscarriage."

Browne on Statute of Frauds, § 155.

> "Perhaps the strictest etymological rule "would be that which was suggested by "Lord Ellenborough in Castling *vs.* Aubert, "2 East, 325, mainly that 'debt' and 'default' *both refer to a liability accruing "upon a contract*, but the former to such as "is already incurred, the latter to such as "may be incurred at a future time."

Sixteen Hundred Tons of Nitrate of Soda, 61 Fed. R., 849:

The Circuit Court of Appeals for the Ninth Circuit in this case construed an identical provision in a charter party.

The charter allowed for the loading and discharging thirty working lay days, to commence twenty-four hours after her inward cargo is discharged—and for every day's detention *by default* of charterer, demurrage, &c.

Vessel received instructions to load at Caleta Buena, in Chile, and while on her way there civil war broke out.

Gilbert, *J.*:

> "Was the delay in loading occasioned by "the *default* of the charterers. * * In "the absence of a clause limiting the liability of the charterers to cases where the detention shall occur from the *fault or default* of the charterers or from some accident or cause specifically named, the obligation to pay demurrage is an *absolute* "one. * * But in this case there is inserted in the demurrage clause a limitation of the liability of the charterers in "loading or discharging. It is stipulated "that they shall be answerable only from "detention which may result from their *default*. To what extent does this provision modify their obligation?
>
> "There is in the use of the word '*default*' "no necessary imputation of negligence.

"*As used in such an instrument it can "mean only the non-performance of con-"tract duty*, a failure of one of the contract-"ing parties to do that which he has con-"tracted to do."

P. 853:

"In the case of Dow *vs.* Hare (Fed. Cases "No. 4037a) an unreported decision of Judge "Hoffman in the D. C. for the N. D. of Cal. "*and affirmed on appeal* to the Circuit "Court, the charterer had chartered the "ship to carry a cargo of coal to the steamer "'Saranac.' When the chartered vessel ar-"rived at the designated port, the 'Saranac' "was not in port. *She had been wrecked "and lost at sea.* The vessel, after waiting "during her lay days and for several days "thereafter, discharged her cargo on the "wharf and brought suit for demurrage. "It was urged in defense of the action "that the charterers were not liable, in-"asmuch as the detention was not due "to their '*default*.' In delivering the "opinion, the Court said: * * By "the bill of lading the 'Saranac' was "the consignee to whom the coal was to "be delivered. The consequence of her un-"punctuality ought rather to be borne by "the party whose agent she was, and who "had particularly stipulated that she should "be ready to receive the whole cargo within "ten days after the ship arrived, rather "than the shipowner, who was a stranger to "the contract."

Booge v. *A Cargo of Dry Boards*, 42 Fed. R., 335.

Charter provided for demurrage for each and every day's detention *by default* of the charterers.

The detention was caused by rainy weather, which prevented the loading of kiln dried boards. Judge Benedict held this to be the default of the charterers, stating:

"The words 'by default of the party of "the second part,' mean the default in fur-"nishing 30,000 feet per day alongside the "vessel for the loading thereof."

It is not claimed that any wrongful act on the part of the master of the vessel prevented the respondents from receiving the cargo sooner than they did, or that he was in any way responsible for the delay.

The contention is that the same cause, namely, the acts of the public enemy which prevented the charterers or consignees from receiving, prevented the vessel from discharging the cargo, and that therefore the delay was not by default of the charterers.

But as has been shown, the obligation of the charterers was not only to receive the cargo but to designate a safe anchorage at which the vessel should discharge, and any delay in the performance of this obligation was as much at their risk as delay in the actual discharge.

To escape liability the charterers must show that they were prevented from discharging the cargo by the wrongful act or omission of the owner, or those for whom he is responsible.

Budgett v. *Binnington*, 25 Q. B. D., 320–327.

Williams, J.: "In the present case the "plaintiffs were not prevented from per- "forming this contract by any default of "the ship-owner, or those for whom he was "responsible. It was the action of the "stevedores and dockers which alike pre- "vented the plaintiffs and defendants from "doing their part in the unloading. This in "no way relieves the charterer or consignee "from the *absolute* contract to pay demur- "rage for delay and detention of the ship "during unloading.

"If the strike of the stevedores had re- "sulted from unreasonable conduct of the "master in refusing reasonable wages asked "by the stevedores, the case might have "been different; for then, perhaps, it might "have been said that the shipowner pre- "vented the charterers performing the con- "tract, and that the act of the shipowner

"was the *causa causans* preventing the "charterer; but even in such a case the "charterer would, in our opinion, have to "show *that he was actually prevented by* "*the default of the shipowner*, *i. e.*, that "there were no available means of perform- "ing the contract, notwithstanding the de- "fault of the shipowner. If such means "were available the charterer must avail "himself of them to discharge the ship and "take his remedy by suing the shipowner "for breach of contract, or he will be liable "to demurrage."

(*2*). The charter-party contains an absolute contract to pay demurrage for detention at the port of discharge, and the charterers are liable for such delay, even though the shipowners were unable to do their part in unloading.

(*a*) The number of lay days were fixed.

By the charter, the number of lay days given to discharge the cargo is fixed by computation. The cargo to be unloaded was 514,255 feet and the rate of discharge was to be 20,000 feet per day. The number of lay days was therefore fixed at twenty-six days, and with the like effect as if that number of days had been stated.

Hall v. *Eastwick*, 1 Lowell, 456.

Carver on Carriage by Sea, § 610.

Postlethwaite v. *Freeland*, 5 App. C., 617.

Blackburn, J. "In many of the cases "cited on the argument at the bar, the "charter-parties were of this nature, and "the question only was whether the lay "days had begun to run.

"Tapscott *v.* Balfour, L. R. 8, C. P. 46, "was of this nature, for although the "charter-party did not name a certain num- "ber of days, it provided that the ship was "*'to be loaded by the defendants at the rate* "*of 100 tons per working day,' and as the* "*burden of the ship was known and id cer-*

> " *tum est quod certum reddi potest, this was*
> " *equivalent to naming a certain number of*
> " *days.*"

(*b*) When the time for discharge is stipulated in the charter, or is fixed by it, so that it can be calculated beforehand, there is an absolute agreement on the part of the charterers to discharge her within that time, and he takes the risk of all unforseen circumstances.

Whatever apparent conflict may exist between the opinion of the District Court and that of the Circuit Court of Appeals upon the sufficiency of the defense pleaded is reconciled by the amendment of the pleadings in the Appellate Court.

The decision of the learned District Judge was based upon the fact that the original libel did not allege actual readiness on the part of the vessel or the designation of a safe achorage.

> He states (p. 31): " The libel does not
> " allege that the vessel was actually ready
> " to discharge at any time before the dis-
> " charge actually began. It only asserts
> " that notice of readiness was given. That
> " is a very different thing. Such notices
> " are often given by shipmasters in the
> " attempt to set demurrage running before
> " the ship is ready or able to perform her
> " obligation to discharge."

This omission was remedied by amendment. The amended libel alleged not only readiness on the part of the vessel and the designation of a safe anchorage by respondents' agent, but also the actual commencement of the discharge of the cargo upon the following day.

The authorities are unanimous in holding that when by a charter party or bill of lading the charterer or consignee undertakes to pay demurrage for detention and to receive the cargo within a certain time, he is liable for delay resulting from *vis major* or other unforeseen circumstances. As pointed out in the opinion by Judge Wallace the authorities cited by the learned counsel for appellants are all

distinguishable, in that in none of them was there an express contract to pay demurrage or an agreement for a fixed period within which the cargo should be loaded or discharged.

In *Empire Transit Co.* vs. *Phila. & R. C. & I. Co.*, 77 Fed. R., 919, decided by the Circuit Court of Appeals for the Eighth Circuit, the rule or principle governing this right to recover demurrage is concisely stated (with an exhaustive citation of authorities) as follows:

> "Demurrage, strictly speaking, can be "recovered only when it is expressly re- "served by the charter or bill of lading. "* * * But one who charters a vessel, "under a contract that is silent as to the "time of unloading and discharge, contracts "by implication that he will unload and "discharge her within a reasonable time or "with reasonable diligence. * * * * * * * "When the time for the discharge of the "vessel is stipulated, or is definitely fixed "by the charter or bill of lading, so that it "can be calculated beforehand, the charterer "thereby agrees absolutely to discharge her "within that time, and he takes the risk of "all unforeseen circumstances. * * * * * "And it is immaterial that the shipowner, "also, is prevented from doing his part of "the work within the agreed time, *unless* "*he is in fault.*"

Davis vs. *Wallace*, 3 Clifford, 131.

> "The settled rule is, where the con- "tract of affreightment expressly stipulates "that a given number of days shall be al- "lowed for the discharge of the cargo, *that* "*such a limitation is an express stipula-* "*tion that the vessel shall in no event be* "*detained longer for that purpose*, and "that if so detained it shall be considered "as the delay of the freighter, *even where* "*it was not occasioned by his fault, but* "*was inevitable.* Where the contract is "that the ship shall be unladen within a "certain number of days, it is no defence "to an action for demurrage that the over "delay was occasioned by the crowded

" state of the docks or by port regulations, " or government restraints. *Detention* of " the vessel for loading or discharging " longer than the time allowed by the con- " tract entitles the owner to the stipulated " demurrage, although it was *impossible* to " complete the work within that time by " natural causes. Randall *vs.* Lynch, 2 " Camp., 352; Barrett *vs.* Dutton, 4 Camp., " 233; Hill *vs.* Idle, 4 Camp., 327; Furnell " *vs.* Thomas, 5 Bing., 188.

Carver on Carriage by Sea, § 608.

" The undertaking as to the time which " the loading or discharge shall occupy *is* " *given by the freighter, not by the ship-* " *owner.* * * The promise is made by the " freighter *for the benefit of the ship-* " *owner.*"

§ **611.** "The difference between charters " in which a *specific time* is allowed, " whether for loading or unloading, and " those in which the lay days are wholly " undefined, is thus of great importance. " In the one case *the time is limited* without " regard to the circumstances under which, " when the time arrives, the contract has, " in fact, to be performed. * *

" When the time is definitely fixed, or is " described so as to be calculable before- " hand there is an *absolute* obligation on " the charterer to have the work completed " within that period, whatever circum- " stances occur. He is answerable although " the completion may have become *impos-* " *sible* owing to causes which have arisen " without any fault or omission on his part. " Thus he bears the risk of delay arising " from the crowded state of the place at " which the ship is to load or discharge " (Randall *vs* Lynch, 2 Camp., 352), or " from frost (Barrett *vs.* Dulton, 4 Camp., " 343), or bad weather (Thiis *vs.* Byers, " 1 Q. B. D., 244), preventing access to the " vessel; or from acts of the Government of " the place prohibiting export, or prevent- " ing communication with the ship (Parker " *vs.* Hodgson, 3 M. & S., 267; Blight *vs.* " Page, 3 B. & P., 295, n.)

"*And it is immaterial that the shipowner*
"*also is prevented from doing his part of*
"*the work within the agreed time; unless*
"*he is in fault. The charterer takes the*
"*risk.*"

Cargo ex Argos, 5 P. C., 161. Sir Montague E. Smith.

"The agreement to pay demurrage after
"24 hours clearly implies that the parties
"contemplated that the ship might be
"detained by his default to 'take out' the
"goods, and that it was not intended the
"master should land or take the risk of
"landing them. The prohibition to land
"the pertoleum, therefore, did not prevent
"the plaintiff (shipowner) from fulfilling
"his part of the contract."

"In Waugh *vs.* Morris (L. R., 8 Q. B.,
"202), the plaintiff recovered for the deten-
"tion of his ship, although *it was not*
"*possible to land the hay* anywhere in the
"port of London. The contract of the ship-
"per in that case does not in their Lord-
"ships' view, substantially differ from the
"defendants in the present."

Thiis vs. *Byers*, 1 Q. B. D., 244.

On the trial before Gove, J.. it appeared that deft. chartered plffs. vessel for a voyage from Pensacola "to a port in United Kingdom. In charter was the "clause, "16 working days to be allowed the said "merchants for loading at P. and *to be discharged* "*at such wharf or dock as charters may direct,* "*always afloat in 14 like days.*"

Vessel was ordered to Middleborough and arrived at the usual place of discharge in river Tees and began discharging. "It was the master's duty, by "the practice of the port to put the timber over the "ships side and form it into rafts, and the con-"signee then sent steam tugs to carry it away. "*After the discharging had begun rough weather* "*came on, during which the master, though ready,* "*was unable to put the timber over the side and* "*form it into rafts,* and consequently it was not

"possible for the charterers to take any timber "away, though the ship remained at her anchor- "age, *and the tugs could have towed the timber* "*away if it could have been formed into rafts.* "The unloading was thus delayed owing to the "rough weather four days."

A verdict was taken for the plaintiff which included £40 for demurrage and leave was given to move to reduce the verdict by £40 if the Court should be of the opinion that by the true construction of the charter deft. was not responsible for the delay occasioned by the bad weather.

Defendant's counsel contended :

> "The deft. is not liable for the delay in "unloading the ship where the unloading, "as here is the *common enployment* of the "ship and freighter. It was the duty of the "ship to discharge the timber over the side "and form it into rafts, and then the defend- "ant to send tugs and take it away. The "*default was in the ship*, for if the rafts had "been formed the tugs could have towed it "away. The unloading being the *common* "*employment* of both parties, neither is liable "for delay caused by *vis major*. Ford *vs.* "Cotesworth, L. R., 4 Q. B., 127 ; L. R., 5 "Q. B. 544. Herschell, Q. C., for plff. pointed "out (248) that as the master and crew were "*ready and waiting*, the delay was not "theirs."

The judgment of the court (Blackburn & Lush, *JJ.*, was delivered by Lush, *J.* (249) :

> "We took time to look into the authori- "ties, and are of the opinion *where a given* "*number of days* is allowed to the charterer "for unloading, *a contract is implied* on his "part, that, from the time the ship is at the "usual place of discharge *he will take the* "*risk* of any ordinary vicisitudes which "may occur to prevent him from releasing "the ship at the expiration of the lay days. "This is the doctrine laid down by Lord "Ellenborough in Randall *vs.* Lynch, 2 "Camp., 355, which was upheld by this

"Court and it has been accepted as the "guiding principle ever since: See Leer *vs.* "Yates, 3 Taunt., 387; Brown *vs.* Johnson "10 M. and W. 331, and the other cases "cited in the argument."

Davies vs. *Mc Veagh*, 4 Ex. Div., 265.

Charter: "Vessel to load in B. M. Dock or W. Dock." Vessel next day after charter was, as a matter of favor, admitted into W. Dock, but owing to regulations of dock authorities did not begin to load till 14 days later.

Charter gave 19 running days to load and discharge. Delay occurred in discharging, so that 20 days elapsed after the 19 running days—if calculated from the time of admission to dock.

Bramwell, *J.*

"When a ship is to take on a cargo at a "specified place of loading the responsibility "rests, not with the owner, but with the "charterers, if the specified birth is not in a "fit state to receive her upon her arrival at "the appointed time.

Postlethwaite vs. *Freeland*, 5 Ap. C., 617.

Blackburn, *J.*

"As the merchant, if not himself resident "at the port of discharge, at all events has "a consignee and correspondent there resi- "dent, he presumably knows all about the "means and appliances for discharging a "ship there, better than the shipowner. *It, "therefore, seems very reasonable that the "shipowner in making his bargain should "require the merchant to make an estimate "of the probable time of discharging the "ship, and take on himself the risk of that "time being exceeded;* and then the ship- "owner can fix the payment he is willing "to take with reference to this, and this has "long been done by providing lay days and "demurrage days for discharging. In the last "edition of Abbott on Shipping, published "while Lord Tenterden was living, it was "said (5 ed., 180) * * * 'And where "'the time is thus expressly ascertained

" ' and limited by the terms of the contract,
" ' the merchant will be liable to an action
" ' for damages, if the thing be not done
" ' within the time, although this may not
" ' be attributable to any fault or omission
" ' on his part, *for he has engaged that it*
" ' *shall be done.*'

" These last words are put in italics by
" Lord Tenterden. It still remains the more
" usual form of charter-party to insert lay
" days and demurrage days.

Leer vs. *Yates*, 3 Taunt., 387, Mansfield, *C. J.* Goods under other cargo could not be discharged within the lay days. Held, cargo owners liable for damages.

" But it is not in truth the fault of either
" the plaintiff or defendant that the goods
" could not be taken out."

Porteous vs. *Watney; Straker* vs. *Kidd* 3 Q. B. D., 226 Lush, *J.*

" Now, the only thing which prevented
" the delivery in the present case was the in-
" ability of the master *to get at the goods*
" because they were stowed at the bottom
" of the hold, and because the owners of
" the super-incumbent goods had neglected
" to take those goods away in proper time.
" Can this neglect of the other consignees
" be said to be the *default* of the master?
" If not, it is immaterial whose fault it was,
" *for the defendants undertook that whether*
" *they were able to get away their goods or*
" *not, they would pay demurrage if the*
" *ship was not cleared within the stipulated*
" *period*, the contract being as I have said
" an *absolute*, and not a conditional con-
" tract. Now, it is clear that *the master*
" was not in *default. He was ready and*
" *anxious to deliver.*"

S. C., 3 Q. B. D., 534. Affd. by Court of App. Theisinger, Cotton and Brett, *JJ.*

Brett, *J.* (543).

" The defendant is to pay unless it is the
" *fault* of the shipowner."

Randall vs. *Lynch*, 2 Camp, 352, Ld. Ellenborough:

> "The question is whether the detention "of the ship, arising from the inability of "the London Dock Co. to discharge her, is, "in point of law, imputable to the freighter, "and *I am of opinion that a person who "hires a vessel detains her, if at the end of "the stipulated time he does not restore her "to the owner.* He is responsible for all the "various vicissitudes which may prevent "him from doing so. * * * The defend- "ant is as much responsible for a delay "arising from the want of a berth as if it "had arisen from tempestuous weather, or "any other cause."

Barker vs. *Hodgson*, 3 Maule & Selwyn, 267: In consequence of an *infectious disorder* at Gibraltar, all intercourse with ships was prohibited and deft. could not load a cargo on brig Providence within the 60 running days allowed by the charter. Lord Ellenborough, *C. J.*

> "Is not the freighter the adventurer *who "chalks out the voyage* and is to furnish at all "events the subject matter out of which "freight is to accrue? * * But if in conse- "quence of events which happen at a foreign "port, the freighter *is prevented* from fur- "nishing a loading there, the contract is "neither dissolved, nor is he excused for "not performing it, but must answer in "damages."

Barrett vs. *Dutton*, 4 Camp., 333: Gibbs, *J.*, held that where a certain number of running days were allowed for loading, the freighter is liable for delay caused by the *impossibility of loading owing to ice in the river*, although the vessel could not have sailed if loaded.

Bessy vs. *Evans*, 4 Camp., 131: 30 days for loading and unloading cargo allowed. Discharge stopped by Custom officers. Lord Ellenborough:

> "At the expiration of the 30 days I think "you became liable for demurrage, although

> " you have been *prevented* from unloading
> " the goods by the wrongful act of a
> " stranger."

Grant vs. *Coverdale*, 9 P. C., 470: Charter of SS. Merrythorpe. Steamship was to proceed to Cardiff and East Bute dock and there load a cargo of iron; cargo to be supplied as fast as steamer can receive, except in case of frosts preventing the loading. The ship loaded part of her cargo. A frost set in, which made a canal which communicated with the dock impassable, so that cargo ready at a wharf on the canal could not be brought in lighters to the dock. Held (Affg. Ct. of Ap.) that the frost did not "prevent the loading." Lord Selbourne says, p. 477:

> " I infer from the finding of the referee,
> " that the whole *might have been done by*
> " *carting*, though I agree that it would have
> " been an expense which was preposterous
> " and unreasonable, if you were to look at
> " the interest of the charterer; but if the
> " charterer has engaged that he will do a
> " certain thing, he must, of course, pay the
> " damage which arises from his not doing
> " it, whatever the cause of his not doing it
> " may be, whether it be his not being willing
> " to incur an unreasonable expense, or
> " whether it be any other cause.

Budgett vs. *Binnington*, 25 Q. B. D., 320. Plaintiffs were endorsees of B/L for a cargo of barley shipped on S.S. Fairfield, "all conditions as per charter party," by which the cargo was to be taken from alongside the steamer at freighters' expense and risk. Seven running days were allowed for unloading. B/L contained the usual exceptions. but neither it nor C/P contained any reference to strikes.

The F. arrived at Bristol and her lay days commenced Nov. 25th.

At Bristol, grain cargoes in bulk are discharged by the *joint* action of the consignee and shipowner. The consignee furnishes bags and "*bushellers*" to fill

the sacks, and the shipowner hoists them to the deck and put them on scales and consignee weighs them. Different stevedores were employed by the shipowner and consignee. On Nov. 28 the laborers employed by both firms of stevedores struck and no cargo was discharged until Dec. 4. The shipowner claimed demurrage and consignee paid £147 under protest, and sued to get it back.

The jury found that the shipowners were not ready to perform their part of the discharge, and the judge left the parties to move for judgment.

Willliams, *J.*—"The fact is that the obli-
"gation of the consignee to pay demurrage
"is '*absolute*,' as was decided in Thiis *vs.*
"Byers, 1 Q. B. D. 244."

"*The readiness and willingness of the*
"*master to make delivery is not the con-*
"*sideration of or a condition precedent to*
"*the undertaking to pay demurrage for the*
"*detention of the ship*, and this being so it
"is not sufficient to relieve the consignee
"of the obligation to pay demurrage, that he
"should show that the master was *unable*
"to perform some obligations undertaken
"by him in the charter party; *but it must*
"*appear that the consignee was prevented*
"from discharging the ship within the time
"allowed for unloading *by the act of the*
"*master*, ar those for whom *he* was responsi-
"ble. * * *

"In the present case the plaintiffs were
"not prevented from performing their con-
"tract by any *default* of the shipowner, or
"those for whom he was responsible. It
"was the action of the stevedores and
"dockers, which alike prevented the plain-
"tiffs and defendants from doing their part
"in the unloading. This is no way relieved
"the charterers from the *absolute* contract
"to pay demurrage for the delay and de-
"tention of the ship during unloading."

(1891) 1 Q. B., 36, on appeal.

Esher M. R. "This is a contract by the
"freighter, by which he undertakes under

"certain circumstances to pay demurrage. "* * It has been held that the demur- "rage contract, *where a fixed number of* "*lay days is mentioned*, is a contract by "the freighter, that *if the ship is detained* "*over those days, he will pay demurrage* "*for so long as the ship is in such a condi-* "*tion that she cannot be handed back for* "*the use of the shipper* (*shipowner*?) This "has been called an *absolute* and independ- "ent contract, and it is obvious that a con- "trast is intended to be drawn between "such a contract and a conditional one, *and* "*that by an absolute contract is meant an* "*unconditional one.* The only condition "attached to it is, that the lay days shall "have commenced and run out, and that "condition being fulfilled, the obligation "arises.

"*Directly the shipowner shows this state* "*of facts, he has proved his case*, and it "lies on the other side to show not that there "has been no breach of contract, but *that* "*he is excused from the performance*—in "other words, his case is one of confession "and advoidance, *and the whole burden of* "*proof is on him.* * *

P. 39.

"*Of this I am certain, that if the ship-* "*owner is prevented from carrying out his* "*share of the discharge by the acts of per-* "*sons over whom he has no control, the case* "*comes within the same category as the* "*case of non-delivery caused by some physi-* "*cal misfortune over which he has no con-* "*trol.* In such a case it has been decided "that he is not prevented from enforcing "the contract of the freighter—as, for in- "stance, in the case of prevention by "weather or the acts of other consignees pre- "venting a lower cargo being taken out of "the vessel. * * That reduces the matter "to the question whether there has been "*default* by any persons for whom the de- "fendants are responsible. * * The ship- "owner had no control over these workmen, "and is not responsible for the consequences

"of their acts, and consequently there is "nothing to relieve the consignee from the "*absolute* contract to pay demurrage. This "is no new principle of law but only a ques- "tion whether the facts bring this case "within a recognized rule or law."

Lindley, L., J.:

"On whom does the risk of strikes fall "in a contract such as this, where the risk "is not expressly excepted from the risks "which the freighter is to bear? The con- "tract was to discharge the ship, in a cer- "tain number of days. * * The stipula- "tion is in terms unconditional and it has "frequently been call an *absolute* contract, "by which I understand an unconditional "contract. * *

"It is argued that * * the shipowner "shall be able and willing to do his part in "the unloading, and that if he is not so able "and willing the freighter is relieved from "the consequences of a breach on his part.

"Such a statement is far too wide; for if it "were true, the cases of Thiis *vs.* Byers, 1 Q. "B. D., 244; Porteous *vs.* Watney, 3 Q. B. "D., 227,534; and Straker *vs.* Kidd, 3 Q. "B. D., 223, would have been improperly "decided."

Lopes, *J.* (41):

"There is an essential difference between "the cases where a specific time is allowed, "for loading and unloading, and cases "where the lay days are not defined.

"In the former case the time is limited "without reference to subsequent events. " * * This is then, as I have said, an "*absolute* contract on the part of the mer- "chant to have the cargo unloaded within a "specified time.

"*In such case the merchant takes the risk.* " * * I can find no *default* in the ship. "The strike was an unforseen occurence "over which the ship had no control."

III.

The discharge of the cargo was not prevented by the act of the public enemy.

This question having been heard on the exception to the sufficiency of the defense, the question as to the truth of the allegations of the answer was not before the Court.

The amended libel alleged actual readiness on the part of the vessel, the designation of a safe anchorage by the charterers, and the actual commencement of the discharge of the vessel at such anchorage, and its continuation without serious interruption for a considerable period. The proofs fully established and substantiate the allegations of the libel in this respect.

It is shown that the vessel arrived on August 30th, gave notice of readiness to discharge on September 4th; the charterers designated a safe anchorage, to which the vessel proceeded on September 5th; on September 6th the discharge of cargo was begun and proceeded with almost daily, until September 30th.

Capt. Wilson testified that the revolution or hostilities did not break out until after he had given notice to the charterers, and that at no time did the firing in the harbor or any act or hostilities prevent the discharge of cargo (p. 77). While the interruption of business, consequent upon the state of war existing, was undoubtedly the indirect cause of the failure of the consignees to receive and remove the cargo more rapidly than they did, the evidence establishes that the acts of the enemy did not in any manner prevent the discharge of same by the vessel.

Even, therefore, if the defense pleaded, would have been good if established, it appears that the allegations of the fifteenth article of the answer are not, in fact, true.

IV.

The defense of an account stated and satisfaction of all claims under the charter-party was not established.

The contention of the appellants is that a payment of £515 6s. 5d. made by their agent to Phipps Bros. & Co., for the libellants, was received and accepted in full satisfaction of all claims under the charter.

(1) Captain Wilson testified that when the lay days expired, he called on the consignees and stated that he intended to claim demurrage, and was told that he could not claim any demurrage on account of the revolution (pp. 77–79).

Hime admits that the captain called on him about the delay in discharging the cargo, and that he (Hime) told him that he had to obey the government's orders and that he had nothing to do with it (p. 66).

How can it be contended that the payment of £515 6s. 5d. made by the consignees, was in discharge of a liability, which, they insisted, did not exist?

Under the terms of the bill of lading the master could not enforce against the cargo or recover from the consignees damages for delay caused by the state of hostilities, and his claim for same was met by a refusal to pay based upon that express ground.

What was then left for him to do but to enter his protest before the Consul and reserve his owner's rights?

It is shown that no statement or account of the demurrage was presented by the master or by Phipps Bros. & Co. to the consignees, and that the only account rendered was the one prepared by the consignees and presented to Phipps Bros. & Co. accompanying the payment of the £515 6s. 5d.

That statement appears at pages 69–70 of the record. It is for freight and for freight alone and shows that the £515, 6s. 5d. was the exact amount of the *freight* due under the charter-party, less the

amount of a prior payment on account. The acceptance of the admitted balance of freight due, shown by such account cannot be considered as a settlement of *demurrage.*

Perkins v. *Hart*, 11 Wheaton, 237–257.

> "A settled account is only *prima facie* "evidence of its correctness. It may be "impeached by proof of unfairness or mis- "take in law or in fact; *and if it be con-* "*fined to particular items of account, it* "*concludes nothing in relation to other* "*items not stated in it.*"

Harden v. *Gordon*, 2 Mass., 562.

Some stress was laid by the appellants upon the letter of the libellants to Phipps Bros. & Co., dated October 11, 1893 (p. 94), in which they call attention to the fact that there is no exception in the charter-party covering the occurrences at Rio, and suggesting that the consignees may be liable for the delay. This letter, however, should be read in connection with the testimony of the libellant, Burrill, (p. 82).

> "Bnt at that time I wasn't aware that the "bill of lading didn't refer the charter-party. "If I had known that of course I would have "known too much to ask them to collect "demurrage."

(2.) There is no proof of the authority of either the master or Phipps Bros. & Co. to waive the claim for demurrage or to enter into an accord and satisfaction.

If purporting to act under a power of attorney, it is obvious that the powers of the special agent would be restricted to the four corners of the paper.

Dunlap's Paley's Agency, p. 201.

Does it make any difference that the paper is called a charter-party?

The charterers had the charter and that told them what their contract obligations were, and that they were dealing with an agent whose *duty was expressed in the paper*, viz., collect the agreed freight and demurrage.

Dunlap's Paley's Agency, p. 201.

"Nor can an agent without express authority compound a debt."

Abbott on Shipping (12 Eng. ed.), p. 89:

"But if the owners themselves have made "a *special contract* for the employment of "of their ship, the master cannot, by the "general and implied authority of his "character as master only, annul such a "contract and substitute another for it, "with the other contracting party."

Sickens v. *Irving*, 7 Com. B., 165.

Williams, *J.* (171):

"Now there can be no doubt that an "agent appointed to load a cargo at a foreign port has authority to do all acts that "are necessary for the performance of the "contract; and also to vary the mode of "performance if any exigency arises, provided the contract be substantially performed.

"But there is no ground for contending "that he has by law any implied authority "to substitute a new contract, to substitute "one sort of commodity for another, sugar "for salt for instance, or to appoint a different place of loading from that contemplated by the charter party. It is quite "new to me to hear it suggested that he has "such authority, and I cannot but think it "would be very mischievous if the agent's "authority could be so extended as thus to "vary the contract of his principal."

Byles, *J.* (173):

"It was contended that the agent necessarily had an implied authority to deviate

"from the strict letter of the charter party,
"or, in other words, that they had an im-
"plied authority to direct the loading of a
"different article in a distant port. It
"seems to me, however, that the agents had
"no such authority in point of law."

Earl, *C. J.*:

"I think this decision is one of very con-
"siderable importance, for, if Mr. Wilde
"had succeeded in his argument, it might
"have thrown doubt upon the well-known
"and to the mercantile world, most import-
"ant rule, that an agent must be strictly
"limited by his authority."

The only evidence bearing upon the question of the authority of Phipps Bros, & Co is that of the witness Hime, who testified that the Companhia Industrial do Brazil received a letter from Phipps Bros. & Co. in which the latter stated that they were the attorneys for the owners of the vessel, instructed the company not to give the captain any money but to liquidate the accounts of the vessel with them. The letter itself was not produced, the witness stating his recollection of its contents (p. 66).

This testimony is clearly insufficient to sustain a contention that Phipps Bros. & Co. had authority to waive or compromise the libellants' right to demurrage under the charter party.

Lastly, The decree of the Circuit Court of Appeals should be affirmed with interest and costs.

LAWRENCE KNEELAND,
Counsel for Appellees.

Supreme Court of the United States.

No. 26.—October Term, 1900.

George W. Crossman and Herman Sielcken, Petitioners, *vs.* William Burrill and others, Owners of the Bark Kate Burrill. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 5, 1900.]

Mr. Justice Gray delivered the opinion of the Court.

This case comes up by writ of certiorari issued by this court to review a decree in admiralty of the Circuit Court of Appeals for the Second Circuit, which reversed a decree of the District Court of the United States for the Southern District of New York; and appears by the record to have been in substance as follows:

A libel in admiralty *in personam* was filed in the District Court of the United States for the Southern District of New York by the owners of the bark Kate Burrill against her charterers to recover fifty-three days' demurrage for her detention at Rio Janeiro in Brazil, in unloading a cargo of lumber shipped for that port from Pensacola in Florida, under a charter-party dated March 7, 1893, by which the charterers were to pay a stipulated rate of freight on proper delivery of the cargo at the port of discharge, and which contained these other provisions:

"Cargo to be furnished at port of loading at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted; and to be discharged at port of destination at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second part, or agent, fifty-nine $\frac{46}{100}$ dollars United States gold (or its equivalent) per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

"The cargo to be received at the port of loading within reach of ship's tackles, and to be delivered at port of discharge according to the custom of said port. Vessel to discharge at safe anchorage ground in Rio Bay designated by charterers.

"The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. Charterers' responsibility to cease when the vessel is loaded and bills of lading are signed."

The libel alleged, in the fourth article, that the vessel was loaded with the cargo of lumber at Pensacola, and sailed thence for Rio Janeiro, where she arrived about August 30, 1893; and, in the fifth article, "that on September 4, 1893, notice in writing that the vessel was ready to discharge her said cargo was duly given by the master of said vessel or her duly authorized agents to the Companhia Industrial do Brazil, the agent of the respondents at said port of Rio, who received the said cargo;" but that the vessel did not complete the discharge until November 28, 1893, being a period of fifty-three days beyond the twenty-six days, Sundays exclusive, allowed for the discharge by the charter.

The libel was allowed to be amended in the Circuit Court of Appeals, by alleging "that at the time of giving the notice of her readiness to discharge her cargo, mentioned in the fifth article, the said vessel was in fact ready to discharge upon the charterers designating a safe anchorage for that purpose;" by setting forth more particularly the times of the delay and suspension of the discharge of the cargo, and by alleging that during all those times the vessel was ready and willing to discharge the same; and by further alleging that there had been no payment or accord and satisfaction of the claim for demurrage.

Among the defences set up in the District Court, and more fully, but with no substantial difference, in an amended answer filed by leave in the Circuit Court of Appeals, and to the sufficiency of each of which defences the libellant filed exceptions in either court, were those which are here numbered, for convenience, as the exceptions were numbered in the Circuit Court of Appeals, and which were stated in the amended answer as follows:

Second. "That the charter-party referred to in the libel contained a clause providing that the vessel should have an absolute lien upon the cargo for freight and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading; that said vessel was fully laden, as alleged in the fourth article of the libel, and that thereafter, and long prior to September 4, 1893, (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo,) bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel,

a copy of which is annexed hereto, and made part hereof; and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel da Cruz & Filho, who thereby became the consignees of said cargo; and that thereupon all liability of these respondents to the owners of said vessel under said charter-party ceased, and it became the duty of the master and owner of said vessel, upon the failure, alleged in the fifth article of said libel, of the consignee of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of said charter-party." The bills of lading (as appears by the copy annexed to the answer) state that the lumber had been shipped by the respondents, and was to be delivered "unto order or to their assigns, they paying freight for the said lumber as per charter-party dated 7th March, 1893, and average accustomed."

Third. "That when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom; that the libellants were prevented from discharging the same, and the respondents were prevented from receiving the same, any sooner than they did, by reason of the acts of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received; that the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of the respondents; that the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in the said delay, and recognized the necessity therefor."

Fourth. "That when the said cargo was delivered, the said agents of the libellants accepted and received from the said consignee, the sum of five hundred and fifteen pounds, six shillings and five pence, British sterling, in full satisfaction and payment of all claim or demand under the said charter-party, and an account was made and stated between the said agents of the libellants and the said consignees respecting all claims under the charter-party aforesaid, and the balance due upon the said accounting was paid by the said consignee to the said agents, and accepted and received by them in full satisfaction thereof."

The District Court, understanding the facts stated in the answer to have been admitted, sustained the second exception, overruled the third and fourth exceptions, denied a motion to withdraw these exceptions and to amend the libel, and dismissed the libel. 65 Fed. Rep. 104.

The libellants appealed to the Circuit Court of Appeals, which, after allowing amendments of the libel and answer, sustained the second and third exceptions, and overruled the fourth exception, and authorized proofs to be taken upon the defence of payment and accord and satisfaction; and afterwards, being satisfied upon proofs so taken that there had been no payment or accord and satisfaction of the claim for demurrage, entered a decree for the libellants. 35 U. S. App. 608; 62 U. S. App. 368.

The respondents thereupon applied for and obtained a writ of certiorari from this court.

The libellants' claim for demurrage is based on the provisions of the charter-party by which, after the vessel is ready to discharge her cargo of lumber at the port of destination, and written notice thereof given to the charterers, they agree to discharge the lumber "at the average rate of not less than twenty thousand superficial feet per running day, Sundays excepted," and to pay a certain sum, by way of demurrage, "for each and every day's detention by default of" the charterers or their agents.

The charter-party further requires "the bills of lading to be signed as presented, without prejudice to this charter," and contains these clauses: "Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

After the vessel had been loaded, bills of lading were duly signed by the master, by the terms of which the cargo was to be delivered to the charterers or their assigns, "they paying freight as per charter-party," "and average accustomed"—referring to the charter by its date, but not mentioning demurrage.

The first question to be considered is how far the claim of the shipowners against the charterers for demurrage is affected by what is commonly called the cesser clause in the charter-party, "Charterers' responsibility to cease when vessel is loaded and bills of lading are signed."

The Circuit Court of Appeals, approving and adopting in this particular the opinion of the District Judge, held that the cesser clause afforded no defence to the libel; and we have no doubt of the correctness of that conclusion.

The charter-party, like many mercantile instruments in common use, is drawn up in brief and disjointed sentences; and must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself.

The question here is how the clause providing that the charterers' responsibility shall cease when the vessel is loaded and bills of lading are signed is to be reconciled with the other provisions of the charter, which not only require the charterers to pay freight on delivery of the cargo, and demurrage for any delay in such delivery by fault of the charterers or their agent, but declare that the vessel is to have an absolute lien upon the cargo for both freight and demurrage.

The true rule of construction of the cesser clause, in such a connection, has been settled by a series of English decisions in which that excellent commercial lawyer, Lord Esher, lately Master of the Rolls, took a leading part; and is well summed up, with the reasons supporting it, by himself and other judges, in two recent cases in the Court of Appeal. *Clink* v. *Radford*, (1891) 1 Q. B. 625; *Hansen* v. *Harrold*, (1894) 1 Q. B. 612

In *Clink* v. *Radford*, Lord Esher said: "In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." Lord Justice Bowen said: "There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility, which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability." And Lord Justice Fry added: "The rule that we are *prima facie* to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charter party the breach of which would create a legal liability, there would then be a cesser clause destroying that liability, and there would then come a lien clause which did not recreate that liability in anybody else." (1891) 1 Q. B. 627, 629, 632.

In *Hansen* v. *Harrold*, Lord Esher said that he thought that *Clink* v. *Radford* "was a right decision based upon sound mercantile reasons;" and, after quoting the passages above cited from the opinions in that case, added: "It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true, that where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers are able to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability." (1894) 1 Q. B. 617, 618.

In short, in a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate.

In the case at bar, the provision of the charter-party, which requires "the bills of lading to be signed as presented, without prejudice to this charter," while it obliges the master to sign bills of lading upon request of the charterers, does not mean that the bills of lading, or the consignee holding them, shall be subject to all the provisions of the charter; but only that the obligations of the charterers to the ship and her owners are not to be affected by the bills of lading so signed. *Gledstanes* v. *Allen*, (1852) 12 C. B. 202. The bills of lading, as already mentioned, provide only for "paying freight for said lumber as per charter-party dated 7th March, 1893, and average accustomed." They do not mention demurrage, or refer to any provisions of the charter, other than those concerning freight and average. It is well settled that a bill of lading in such a form does not subject an indorsee thereof, who receives the goods under it, to any of those other provisions of the charter. It does not give him notice of, or render him liable to, the specific provisions of the charter, which require a discharge of a certain quantity of lumber per day, or, in default thereof, the payment of a specific sum for a longer detention of the vessel; but he is entitled to take the goods within a reasonable time after arrival, and is liable to pay damages for undue delay in taking them, according to the ordinary rules of law which govern in the absence of specific agreement. *Chappel* v. *Comfort*, (1861) 10 C. B. (N. S.) 801; *Gray* v. *Carr*, (1871) L. R. 6 Q. B. 522; *Porteus* v. *Watney*, (1878) 3 Q. B. D. 534, 537; *Serraino* v. *Campbell*, (1891) 1 Q. B. 283; *Dayton* v. *Parke*, (1894) 142 N. Y. 391.

In *McLean* v. *Fleming*, (1871) L. R. 2 H. L. Sc. 128, on which the charterers relied at the argument in this court, the sole ground on which the

indorsees of the bills of lading were held to be bound by the provisions of the charter-party was that they were the persons who had originally authorized the chartering of the ship. See L. R. 2 H. L. Sc. 133, 134, 136; *S. C.*, L. R. 6 Q. B. 559, 560. No such fact was pleaded in the case at bar.

The only facts stated in the answer upon this point are that, after the vessel was fully laden, and long before the notice to the charterers that she was ready to discharge, bills of lading, acknowledging that the lumber had been shipped by the respondents, and was to be delivered to their order or assigns, "they paying freight for the said lumber as per charter-party," were signed by the master of the vessel, and "were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to" the partnership of da Cruz and Filho, "who thereby became consignees of the cargo."

Upon this state of facts, the rights of the shipowners against those consignees depended altogether on the contract created by the bills of lading, except so far as that contract referred to the charter-party. *Bags of Linseed*, (1861) 1 Black, 108. As observed by Mr. Justice Peckham, when delivering a judgment of the Court of Appeals of the State of New York, in regard to a bill of lading containing a clause exactly like that in the bills of lading in the case at bar, "It would be a wide stretch to hold that by this language of the bill of lading, which plainly referred only to the provisions of the charter-party as to the freight money, a consignee would become liable to demurrage if he accepted the cargo under such a bill." *Dayton* v. *Parke*, 142 N. Y. 391, 400.

The necessary consequence is that the responsibility of the charterers to the shipowners for demurrage according to the charter-party is not affected by the cesser clause.

The other principal question is of the validity of the defence that the delay in discharging the cargo was caused by the acts of the public enemy, and not by any default of the charterers.

Upon this question, the courts below differed in opinion, the District Court holding that the defence pleaded was a good one, and the Circuit Court of Appeals holding that it was not.

This defence, as set up in the amended answer filed in the Circuit Court of Appeals, is that, when the vessel arrived at Rio Janeiro, the owners of the cargo used all reasonable diligence in and about receiving and removing it; that the shipowners were prevented from discharging the cargo, and the respondents were prevented from receiving it, any sooner than they did, "by reason of the acts of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive

it from the said vessel, any sooner than it was discharged or received; that the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of the respondents."

We are of opinion that, under a charter-party expressed in such terms, the defence of *vis major*, as thus pleaded, affords a complete answer to the claim for demurrage.

It is to be remembered that by the terms of this charter-party it is only for "detention by default of" the charterers or their agent, that they agree to pay the amount of demurrage specified in the charter.

A detention which is caused, not by any act of the shipowners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, cannot be considered as caused by "default" of the charterers, in any just sense of the word.

In *Towle* v. *Kettell*, (1849) 5 Cush. 18, the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Fletcher, with the concurrence of Chief Justice Shaw and Justices Wilde and Dewey, held that, under a similar provision in a charter-party, the charterers were not liable for demurrage while the vessel was detained in quarantine by order of a foreign government.

The Circuit Court of Appeals, in support of the opposite conclusion, quoted from an opinion delivered by Mr. Justice Clifford, in the Circuit Court of the United States for the District of Massachusetts, the following passage: "The settled rule is that, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that if so detained it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. Where the contract is that the ship shall be unladen within a certain number of days, it is no defence to an action for demurrage that the overdelay was occasioned by the crowded state of the docks, or by port regulations or government restraints." *Davis* v. *Wallace*, (1868) 3 Clifford, 123, 131. But in none of the authorities cited, either by the learned justice in that case, or by the Circuit Court of Appeals in this, in support of this general statement, was the liability of the charterers for demurrage restricted to the case of their default. In *Davis* v. *Wallace*, indeed, their liability was so restricted; but the defence was a crowded state of the docks, and no question of port regulations or government restraints was before the court.

In *Thatcher* v. *Boston Gas Light Co.*, (1875) 2 Lowell, 361, 363, Judge Lowell, while following that decision in a similar case, said that the decisions

in *Towle* v. *Kettell* and in *Davis* v. *Wallace* "are not inconsistent with each other; and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting directly upon the discharge of that cargo, and not from the indirect action of such force, which by its operation upon other vessels has caused a crowded state of the docks." And he distinctly recognized that a failure of contract on the part of the charterer, "caused by a direct and immediate *vis major*, or something like it," would not be a "default," within the meaning of the charter-party.

In *Davis* v. *Pendergast*, (1879) 16 Blatchford, 565, 567, Chief Justice Waite, speaking of a similar provision, said: "The respondents, in effect, agreed that no more than forty-five running days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption that could not have been anticipated when the contract was made."

The case of *Nitrate of Soda*, (1894) 15 U. S. App. 369, in the Circuit Court of Appeals for the Ninth Circuit, upon which these libellants much rely, falls far short of supporting their claim. In that case, the clause in question was in the same words as in this case; the charterers sent the vessel, for the purpose of loading a cargo of nitrate of soda which they had purchased, to a port in Chili, during the existence of a civil war there, and while the port was in the possession of the insurgents; the sellers declined for a time to deliver the cargo, because they feared that if the export duty, which by the law of Chili was payable upon all such cargoes, was paid by them to the insurgents, they might remain liable for it to the rightful government. It was held that the charterers were liable for the stipulated demurrage during the delay so occasioned. The court, speaking of the word "default" in the charter, said: "The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers." "But there was no interference upon the part of the Chilian government, or upon the part of any armed force, to prevent their obtaining possession of the cargo, or handling or moving the same, or placing it within reach of the vessel's tackle." 15 U. S. App. 374, 376.

In the case at bar, the defence of *vis major*, as pleaded in the answer, was that the shipowners were prevented from discharging the cargo, and the charterers were prevented from receiving it, any sooner than they did, by reason of acts of the public enemy, to wit, certain vessels of war, then in the harbor of Rio Janeiro, were engaged in firing upon the forts in the harbor and in making war upon the government of Brazil; that the firing between those vessels and those forts made it impossible to discharge or to receive the cargo from the vessel any sooner than it was discharged or

received; and that the detention alleged in the libel was caused by those acts of the public enemy, and not by any default of the charterers.

The *vis major*, so pleaded, was, in the words of opinions above cited, a "superior force, acting directly upon the discharge of the cargo;" "a direct and immediate *vis major;*" an "unusual and extraordinary interuption that could not have been anticipated when the contract was made;" "a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers," and an "interference on the part of an armed force, preventing the handling or moving of the cargo."

Upon principle, and according to the general current of authority, the detention alleged was not caused by default of the charterers, and did not render them responsible for demurrage, under this charter-party.

The Circuit Court of Appeals therefore erred in sustaining the exception, in the nature of a demurrer, to that article of the answer which set up the defence of *vis major;* and for this reason its decree for the libellants must be reversed. The decree of the District Court, which dismissed the libel, must also be reversed, and the case remanded to the District Court, in order that both parties may have an opportunity to introduce proofs upon the issue presented by that article.

In the brief of the libellants in this court, it is suggested that the allegations of that article of the answer were not in fact true; and reference is made to the master's deposition, taken after the delivery of the principal opinion in the Circuit Court of Appeals, in which he testified that during all the time that the vessel lay at the wharf, and until the completion of the discharge, there was no firing in the harbor, or other act of hostilities, which prevented her discharge of the cargo or its reception by the consignees.

But on the same page of the brief it is admitted that "this question having been heard on the exception to the sufficiency of the defence, the question as to the truth of the allegations of the answer was not before the court." And this is conclusively established by its opinions and decrees. The principal opinion shows that it took up, in the first instance, the questions of law raised by the exceptions to the answer, because their determination might relieve the parties from the delay and expense of introducing proof. 35 U. S. App. 620. By the decree thereupon made, and set out in the record, the third exception, as well as the second, was sustained, upon the ground that the article of the answer to which it related was "insufficient in the law to constitute a defence;" and the fourth exception was overruled. In short, the defences of the cesser clause and of *vis major* were both held to be insufficient as matter of law, so that no evidence in support of either of them was competent, and no evidence to contradict either was necessary or material.

The only questions of fact, left open for the introduction of proofs, were those of payment, and of accord and satisfaction, presented by the remaining article of the answer. That the Circuit Court of Appeals understood such to be the condition of the case is apparent from its supplemental opinion, after proofs had been taken, in which it observed that "most of the questions arising upon this appeal have been disposed of by this court upon a former occasion, and it remains to be considered whether the defences of payment and accord and satisfaction are sustained by the proofs;" and then proceeded, upon an examination of the proofs, to hold that those defences were not sustained as to the claim for demurrage, and to enter a decree for the libellants in accordance with its former opinion. 62 U. S. App. 368.

The questions of payment, and of accord and satisfaction, need no extended notice. They are pure questions of fact, depending on conflicting evidence and on the peculiar circumstances of the case; upon which, had they been the only questions presented by the record, a writ of certiorari would not have been granted; which appear to this court, upon examination of the proofs, to have been rightly decided by the Circuit Court of Appeals; and which it would serve no useful purpose to discuss.

But for the reasons above stated, in considering the effect of the defence of *vis major*,

The decrees of the Circuit Court of Appeals and of the District Court are reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this court.

Mr. Justice McKenna was not present at the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.